

S E L E C T
C A S E S
I N T H E
High Court of Chancery,
S O L E M N L Y
A R G U E D and D E C R E E D
By the late Lord Chancellor:
With the Assistance of the
J U D G E S.

With an Exact Table to the Whole.

The Third Edition.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of
Edward Sayer, Esq;) for J. WALTHOE, Sen. and are to be sold
by T. OSBOYNE in *Grays-Inn*. MDCCXXXV.

SELECT
CASES
IN THE
High Court of Chancery,
SOLICITORS

ARGUED and DECREED
By the late Lord Chancellor:

With the Assistance of the

JUDGES.

With an Exact Table to the Whole.

The Fifth Edition.

In the SAVOY.

Printed by E. and R. NUTT, and R. GRIFFITHS, Stationers,
in Strand, near the Temple Church, and also by
J. C. GRIFFITHS, in Great Street, MIDDLESEX.

SELECT
CASES
IN THE
High Court of Chancery,
SOLEMNLY
ARGUED and DECREED
By the late Lord Chancellor:
With the Assistance of the
JUDGES

With an Exact Table to the Whole.

The Fourth Edition.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of
Edward Sayer, Esq;) for J. WALTHOE, and are to be sold by
C. OSBOYNE in *Gray's Inn*.



THE TABLE.

A.

Acceptance.

WHere Acceptance makes good
a Breach in form, Page 68

Adjournment, Vide Difficulty.

B.

Bar, Vide Contingency.

Breach, Vide Acceptance.

C.

Chancery, Vide Equity, Will.

NO Conveyance to be set aside
in Chancery, that can be sup-
ported by a reasonable Construc-
tion, 51

Chancery not unlimited or unbound-
ed by Rules, but limited by Pre-
cedents and Practices of former
Times, 95

Chicaneries.

Chicaneries of Law, ridiculous, 33

Condition, Vide Will.

Contingency, Vide Remainder.

Limitation of a Trust of a Term un-
der Contingencies, void, 4

A future Contingent Interest cannot
be barr'd, 12

Limitation of an Inheritance after an
absolute Fee-simple, not good;
secus, if upon a Contingent Fee-
simple, 19

A Man's dying without Heir, in the
Intention of the Law, no Contin-
gency, 22

The Law allows a Remainder dire-
ctly upon an Estate for Life; not
so on a Contingency, unless it be
to happen during the Continuation
of the Particular Estate, *ibid.*

A Possibility upon a Possibility, and
a Contingency upon a Contingen-
cy, may be, 29

Remainders that arise upon Contin-
gencies, out of the Rules of Per-
petuities, *ibid.*

Tho' no Remainder can be after Fee-
simple, yet a Contingent Fee-sim-
ple may arise out of the First Fee, 32

No Remainder by a springing Trust
upon a Contingency, 46

Remainder upon a Contingency that
may happen in a short time, good, 51

Con-

The T A B L E.

Conveyance.

Where there are two Voluntary Conveyances, he that hath the Advantage at Law, ought to keep it, 88
 A Voluntary Conveyance, against a Voluntary Conveyance, to be tried at Law, 93
 Where several Acts make but one Conveyance, each has its distinct Operation to carry on the main Design, 100

Counterpart.

Want of a Counterpart, no Cause to set aside a Deed, in Equity, 83

D.

Debt.

Payment of Debts a most Conscientious thing, and fit for a Court of Conscience to take Care of, 89

Deeree, Vide Witnesses.

Deed, Vide Impropriety.

The Reciting Part of a Deed is no necessary Part either in Law or Equity, 101
 Deed Repugnant in a Part material to what is not material, no Ground in Equity to set it aside, *ibid.*
 A Deed ill drawn, and full of Mistakes and Misrecitals, if really executed by the Party, no Ground in Equity to set it aside, 118

Devise.

Devise of a Term, and Limitation of the Trust of a Term, to one and the Heirs of his Body, good. But a Limitation over, after his Death, without Issue, void, 16

Tho' no Remainder can be limited after Fee-simple, yet by way of Use, or by way of Devise, it hath been done, 31
 Remainder of a Term, by way of Executory Devise, good, 45

Difficulty.

Cases adjourn'd *Propter Difficultatem*; Only out of a Court of Law, where the Proceedings are in Latin, not were they are in English, 52

E.

Equity, Vide Surprise, Revocation, Deed.

Trust to be maintain'd and supported in Courts of Equity, 13
 Equity will make good the Intention of him that made a Trust, *ibid.*
 A Term may be surrendered by Trustees, and merged in the Inheritance, yet the Trust remains in Equity, and the Chancery may set it up again, 15
 Whether a Deed, affirmed by a Verdict at Law, may be set aside in Equity? 56
 Where a Court of Equity may help, where not, 67
 Equity follows the Law, 91
 A Power of Revocation shall not extend further in Equity than the Law will carry it, 126
 A Trust is the proper Subject of a Court of Equity, 127

Estate.

An Estate for Life is of longer Duration, in the Judgment of Law, than a Term for Years, 22

Executor, Vide Term.

Exe.

The TABLE.

Executory Devise, Vide Devise.

Expedition.

Expedition as much the Right of the Subject, as Justice is, and enjoind by *Magna Charta*, 52

F.

Fraud, Vide Surprise.

Fraud is odious, and never to be intended or presumed, but must be plainly proved, 85

Fraud and Circumvention not to be presumed, 114

H.

Heir, Vide Contingency, Term.

I.

Impropriety.

Improprieties of Expression, and Misrecitals, too slight Acts to avoid Deeds, which are well proved, 76

Infant, Vide Will.

Intention, Vide Revocation.

Intention of Parties, if not according to Law, not to be regarded, 19

L.

Leases, Vide Term.

Leases, how well settled in Marriage, 32

Limitation, Vide Devise, Remainder, Tail, Term, Trust.

Limitations of the Trust of a Term, and the Limitation of the Estate of a Term, all one, 48

M.

Misrecital, Vide Impropriety.

Mortgage.

A long Term upon Mortgage, fit to be kept a-foot to protect the Inheritance, and wait upon it, 21

N.

Notice.

NO Notice to the Trustees, not sufficient Cause to set aside a Deed, in Equity, 83

A Voluntary Settlement of, no force against a Purchaser, without Notice, 123

P.

Perpetuity, Vide Remainder.

A Perpetuity, what; and why not to be endured, 31

Those that endeavour Perpetuities fight against God, *ibid.*

Limitations of a Term, one after another, in a Devise, wou'd make a Perpetuity, which the Law abhors, and stands not with its Rules, 17

The Rules of Law to prevent Perpetuities, are the Policy of the Kingdom, 26

Possibility, Vide Contingency.

Power, Vide Revocation.

a

Where

The T A B L E.

Where a Power is reserved, and not
duly pursued, it is the same as if
done without Power, 107
Be a Man wise or not wise, yet if
Compos Mentis, he hath Power to
dispose of his own Property, 107

Presumption, Vide Fraud.

Presumptions of two sorts, Violent,
and Probable, 105. Of what
force, *ibid.*

R.

Reason.

TTrue Reason the same all over
the World, 33

**Recital, Vide Deed, Impropriety,
Devise.**

**Remainder, Vide Devise, Contin-
gency, Tail.**

Where there can be no direct Re-
mainder, there can be no Contin-
gent Remainder, 21. Denied, 32
Remainder of a Chattel Interest, how
it grew up, and increased in time, 33
Remainders of Terms, after Estates
Tail in those Terms, void, 48. Yet
the bare Limitation of the Remain-
der, after an Estate-Tail, which
doth not tend a Perpetuity, is
not void, *ibid.* The Reasons, 49

Repugnancy, Vide Deed.

Revocation, Vide Equity.

A Revocable Deed, attendant upon
a Will, that is revocable, what, 64
All the Circumstances prescribed in a
Power of Revocation must be ob-
served, to make it good and effe-
2

ctual at Law, 65. *Quere* in a Court
of Equity, 66

No Conveyance at Common Law
could have a Power of Revocation
annex'd, but a Condition might be
annex'd, *ibid.*

A Power of Revocation first came in
use after the Stat. 27. H. 8. c. 10, *ibid.*

Where a Man endeavours to inform
himself of his own Power of Re-
vocation, and is hindred from the
Knowledge thereof he ought to be
relieved, 84

In Revocations all Circumstances
must be observed, or the Power
not well executed 86. Yet it seems
where there is a deliberate Intent
to make a new Settlement, and a
Man goes as far as he can, Equity
shall supply, *ibid.*

In what Cases a Defect in the Exe-
cution of a Power of Revocation
may be relieved, 89

To say that a Deed that relates to a
Will, is therefore revocable, as a
Will is, unreasonable, *ibid.*

Where a Deed is made to confirm a
Will, the Estate limited thereby
arises by the Deed, and the Will is
revoked by the Deed, *ibid.*

A Deed not revocable without a Pow-
er reserved in the Deed it self, *ibid.*

No Revocation good in Equity that
is not good at Law, unless the In-
tention be hindred by Fraud, or
Accident, 108. Absurdities that
would otherwise follow, 109

S.

Spyinging Trust, Vide Trust.

Surprize.

Surprize, what, 56, 114
Surprize, how considered in Law and
Equity, 74
Not

The T A B L E.

Not sufficient to set aside a Deed after a Verdict, unless mixt with Fraud, 56

The not reading a Deed to, or by, the Party that executes it, a slender Objection to make out a Surprise, 59

T.

Tail, Vide Term, Trust, Remainder.

A Term, tho' not properly intail'd, yet it is a Disposition of the Term as long as the Tail lasts, 17

Limitation to a Man, and the Heirs of his Body, and to a Man, and the Heirs of his Body during the Life of another and the Heirs of his Body, all one, *ibid.*

Tenant for Life, the Remainder to the Heirs of his Body, the Law vests the whole Remainder in Tail in him, and he may dispose of it, 120

Term, Vide Mortgage, Devise, Tail, Estate, Leases, Limitation.

Regularly a Term for Years cannot be intail'd. 3

A Trust of a Term cannot be intail'd unless it be to attend the Inheritance, 4

An Intail cannot be of a Term in gross, but it may be disposed of; if not, it shall go to the Executors, 9

A Term may be limited to attend the Inheritance in Trust, be it in Fee, or Tail, and there the Heir shall have the Benefit; yet if Debts be, the Executors shall have it, 10

Term, in Law, well alienated, without Fine or Recovery, *ibid.*

A Term of 1000 Years cannot be intail'd, but shall go to the Execu-

tors, 11. Yet a Trust of such a long Term shall wait on, and go along with the Inheritance, *ibid.*

A Term attending the Inheritance barr'd by a Recovery, 16. But not a Term in gross, and a collateral thing, *ibid.*

Term limited to Daughters, upon the Son's dying without Issue, the Son makes the Daughters his Executrixes, the Term shall be Assets, 18

Term in gross cannot be limited in Remainder, *secus*, Terms that attend the Inheritance, 23

He that creates a Term attendant upon an Inheritance, may sever it if he will, 46

Trusts of Terms, when introduced, 44

Trust, Vide Contingency, Term, Equity.

Trust of a Term cannot be intail'd; yet if the Inheritance be intail'd, the Term may be limited to wait on the Inheritance. 5

A Trust ending by way of Limitation, and a new Trust springing, 9

Reasons that support the springing Trust of a Term, as well as the springing Use of an Inheritance, 32

A new springing Trust upon the same Term, as reasonable as a new springing Lease upon the same Trust, 50

Trusts, the proper Subject of a Court of Equity, 127

V.

Verdict, Vide Equity, Surprise.

A Deed tryed and confirmed by a Verdict passeth all that the Words can carry, and the Validity not to be question'd, 73

Voluntary Conveyance, Vide Conveyance.

Volun-

The TABLE.

Voluntary Settlement, Vide Notice.

Where two Persons claim by two
Voluntary Settlements, the Matter
stands upon an equal foot, 123

Use, Vide Devise.

W.

Will, Vide Revocation.

A Feoffment depending on a Will
may be revoked by revoking
the Will, tho' Livery of Seisin was
made, 86
Will, not controlled by other Conje-
ctural Evidence, 130, 133

Relief from a Condition precedent in
a Will or Devise, rarely granted in
a Court of Equity, tho' often from
a Condition subsequent, 130, 135
Heirs at Law much favour'd, if the
Words of a Will, are ambiguous,
131

Where Infants take by Will, they are
bound as strictly as other Per-
sons, 132. So where an Infant is
bound to perform a Condition, 135
The Power and Jurisdiction of Chan-
cery, in the Case of Wills, In-
fants, &c. 136

Witness.

No Decree can be made against a
Man's Answer, upon the Proof of
one Witness, 123



THE

T H E
Duke of Norfolk's
C A S E,
Or the Doctrine of
P E R P E T U I T I E S.

A. Bargains and Sells to L. the Baronies of Gr. and Br. for 10 Months. 20 Martii. 1647.
A. Grants the Reversion of those Baronies to R. and D. and their Heirs to the use of A. for life. 21 Martii. 1647.
Remainder to E. the Wife of A. for Life, Remainder to R. and D. &c. for 200 years upon trusts, to be declared by another Deed of the same date, Remainder to H. H. his second Son and the Heirs Males of his body, Remainder to C. H. his third Son, and the Heirs Males of his body, Remainder to E. H. his fifth Son, and the Heirs Males of his Body, Remainder to A. H. his sixth Son, and the Heirs Males of his body, Remainder to B. H. and the Heirs Males of his body, Remainder to the right Heirs of A.

L. Attornes Tenant to R. and D. &c.

A. makes another Deed declaring the Trust of the Term for 200 years reciting it, and the uses in the last-mentioned Settlement, says in the reciting part, That 'tis intended that the Term should attend the Inheritance, the Profits be received by H. H. and the Heirs Males of his body; and for default of such Issue, such other persons, who according to the limitation of Uses, should have had them if no such term had been, so long as T. H. Eldest son of A. or any Issue Male of his body shall live. But in case T. H. die without Issue of his body, in the life of H. H. not leaving his Wife enſient with a Son, or that after the death of E. H. by failure of Issue Male of T. H. the Honour of A. should descend on H. H. then H. H. and his Heirs to be excluded of the Trust, then the Indenture witnesseth, that the Term shall be upon the Trusts

and under the restrained Limitation and Proviso's after-mentioned, viz. If T. H. or any Issue Male of his Body be living, in trust for H. H. and the Heirs Males of his Body, until by the Death of T. H. without Issue Male, and not leaving his Wife ensient with a Son, or after his Death, by failure of Issue Male, the Honour of A. descends to H. H. and in case the Honour shall not descend to H. H. that after the Death of H. H. the Trust shall be for the Heirs Males of H. H. and for Default of such Issue in trust, to permit such other Persons and their Issue Male respectively, to whom the Freehold or Inheritance is limited by the former Deeds, to take the profits, as if no such Lease were. And in case the Honour of A. descend upon H. H. then the Trust for H. H. and his Issue Male to cease.

And then as to the Barony of Gr. in trust for C. H. and the Heirs Males of his Body, Remainder to C. H. and the Heirs Males of his Body, Remainder to F. H. and the Heirs Males of his Body, Remainder to B. H. and the Heirs Males of his Body, Remainder to H. H. and the Heirs Males of his Body, Remainder to the right Heirs of A. the Father.

And as to the Barony of Br. as to one third Part of it, in trust for E. H. and the Heirs Males of his Body, Remainder to F. H. and the Heirs Males of his Body, Remainder to B. H. and the Heirs Males of his Body, Remainder to T. H. and the Heirs Males of his Body, Remainder to H. H. and the Heirs Males of his Body, Remainder to the right Heirs of A. And as to another third Part of the Barony in trust for F. H. and the Heirs Males of his Body, with like Remainders to the other Brothers, ut supra: Remainders to the right Heirs of A. And as to the other third part, in trust for B. H. and the Heirs Males of his Body, with the like Remainders to the rest of the Brothers, ut supra.

A. died in 1652.

E. the Wife of A. died in 1673. and then the Term of 200 years commenced.

20 Novemb.
1675.

D. the surviving Trustee at the Request of H. H. assigned the Term to one Marriot.

1 Dec. 1675.

Marriot assigned the Term to H. H.

24 Octob.
1675.

H. H. by Bargain and Sale enrolled, sells to M. to make him Tenant to the Precipe for suffering a Recovery.

25 Octob.
1675.

The use of the Recovery declared to be to H. H. and his Heirs.

Nov. 1677.

T. H. the eldest Son of A. died without Issue or having ever been married.

Query.

If the Trust to H. H. be good, and the other Trusts limited to the other Brothers on the Contingent, in case T. H. died, whereby the Honour of A. should descend to H. H. be good or void, relievable or not relievable in a Court of Equity, the Term being surrendered?

Serjeant P.
son's opini-
on 26 Dec.
1677.

I am of Opinion, that the Trusts to all the Brothers of H. H. in his Term are void, and no ways relievable in Equity: For if these

these Limitations, being made after T. H. shall die without Issue Male of his Body were good in their Original Creation to the Brothers of H. H. it must be by the attendency of the term upon the Reversion of the Estate which was so intailed, and then when their Estates in remainder were docted by the recovery which H. H. suffered, and the Trusts that attended on them were likewise destroyed, and can never survive the Remainder on which they depended, no more than they could have stood alone in their Original Creation.

I conceive that the Trust for the Term is appointed to wait upon the Inheritance in the fore-part of the Deed, though seeming contrary to the latter-part is not so, but both may be reconciled (that is to say) shall wait upon the Inheritance upon such Contingencies as hereafter is expressed, being the Trust is limited and in the same order, only the Contingencies of the Death of T. H. without Issue, &c. prout.

Serj. M---d's
opinion 28
Dec. 1677.

The Trust of the Term limited to H. H. and the Heirs Males of his Body, with Remainders over as the Case is, I think is a good Trust, and will go accordingly, so long as there is no charge made, though regularly a Term for years cannot be entailed, yet it may be made to wait upon the Inheritance that is intailed.

Regularly a
Term for
Years cannot
be entailed.

But when it is so limited, 'tis not properly an Intail within the Statute de Bonis, but governable partly in Equity, and partly in Law.

H. H. to whom it is so entailed may dispose of it, and thereby bind his Issue without Fine and Recovery, as I conceive. And the Term so limited in tail, shall be subject to his Debts against the Issue in tail, as I also conceive.

By the Recovery suffered by H. H. all the Intails are barred, and consequently the waiting of the Term upon the Inheritance destroyed, because the Inheritance it self is changed; but the bare surrender of the Trustee could not have that Operation if nothing else had been in the Case.

But the greatest question in this Case, I conceive, will arise upon the Death of T. H. without Issue and the other Contingencies, because the Trust of the Term is not limited to H. H. absolutely, but to cease upon those Contingencies, and then to be altered; yet seeing the main Intention of the Settlement was to make the Term wait upon the Inheritance, as by the Recital of the Deed, and when it changes is limited by Way of Inheritance.

Therefore I conceive that H. H. whilst he was owner of the Inheritance and trust of the Term, suffered a Recovery, the Contingent trusts of the Term to the others are destroyed.

In Law they have no Relief, because the Estate for years is surrendered, and I conceive the Chancery will not support such leaping Limitations of a Term for years, especially when it cannot take effect in toto, as the contingent Limitations are, and the Remainders in that case will be void.

M---d.

B 2

I am

Sir William
Jones's opi-
nion 20 Jan.
1677.

A Trust of a
Term cannot
be Intailed,
unless it be
to attend an
Inheritance.

I am of Opinion that the Term being limited to H. H. and the Heirs of his Body under other Limitations than the Inheritance was, the whole Term vested in H. H. and the Limitations thereof to the other Brothers were void: For a Trust of a Term cannot be Intailed unless it be to attend an Inheritance; and the Limitations of the Trust differing from the Limitations of the Inheritance, 'tis all one as if the Trust of the Term was Limited, without respect to any Inheritance, in which Case the Limitations of the Term to the other Brothers would be clearly Void. Next I take it to be clear, that taking the Trust of the Term to be attendant to the Inheritance of the Recovery, having barr'd the Remainders of the other Brothers as to the Inheritance, the Trust of the Term must needs be wholly in H. H. and that the other Brothers can never claim the same in Equity: For since the Inheritance (as intendant to which they could only be Entitled to any Part of the Trust of the Term) is vested wholly in H. H. and no remainder left in the Brothers, there can be no Remainders in any of them of the Trust of the Term; but as the whole Inheritance is now in H. H. so doth the whole Trust attend that Inheritance.

W. Jones.

Sir William
Jones's opi-
nion 30 Oct.
1680.

Limitation
of a Trust of
a Term un-
der Contingencies,
void.

I am of Opinion, that the now Duke of Norfolk and Earl of Arundel, have a good Title to the said Baronies. First, in Law 'tis clear, that the Term is Surrendered; and so if any Title remain to the younger Brothers, it can only be in Equity. And Secondly, I think there is no Title in Equity, as to which it may be insisted upon, that if the Limitations of the Trust of the Term were at first good; yet seeing they are chiefly to attend the Inheritance, and that Inheritance by the Recovery is changed and made a Fee Simple, and this before the Contingency in the Limitation of the Trust of the Term happened, whereby the Limitations of the Trusts are changed, and the younger Brothers cannot have the Term in the same plight, nor during the same Estate, as were at first designed. I say, from these Considerations it may be concluded, that the Limitations of the Trust of the Term are destroyed; but that which I do most rely upon, is, that the first Limitation of the Trust of this Term under this Contingency, was altogether void; as to which, the Case is no more than that a Term of 200 years is granted in Trust, that H. H. and the Heirs of his Body shall receive the Profits, until by the Death of T. H. and the Failure of Issue Male of his Body, the Honour of A. shall come to H. H. and in case the Honour of A. shall descend to H. H. then the Trust for him and the Issue Male of his Body to cease; and then 'tis limited respectively to the younger Brothers, and the Heirs Males of their respective Bodies; I conceive these Limitations to the younger Brothers are void. First, it will be agreed, that the Limitation of the Trust of a Term to one and the Heirs Males of his Body, and for want of such Issue to another is void. As to the Second, I think it as clear,

clear, that if a trust of a term be limited to one, as long as John a Styles hath issue of his Body, and that John a Styles die without Issue of his Body, then to another, that Remainder is void: Likewise that which seems to make the doubt in this present Case is, that the Contingency must happen within a Life (viz.) the Honour of A. descend to H. H. which must be to him in his life-time, or not at all. To which I answer, that though a Contingency be remote in it self, and not likely to happen within a Life, the time within which it ought to happen, or not at all, doth not alter the case, and therefore in Child and Bayly's Case, reported in 2d Croke, 459. and by Jones and Palmer, the Failure of Issue was Limited to be within a Life (viz.) a term was devised to one and his Assigns, and if he die without issue of his body living at the time of his death, then to another: this was adjudged no Remainder unto that other; and though 'twas objected that the Contingency must happen within the compass of life, or not at all, yet no regard was given to that. this Case seems to me in reason to be the same with ours. I do observe, that no Case can be found, where Limitation either by way of trust or Devise of a term hath been allowed to take effect upon a Failure of issue, or after death of the party to whom the first Estate was limited without issue. And as in Child and Bayly's Case the Judges say, as I have often heard them say in other Cases (that if Matthew Manning's Case was now to be adjudged, it would not be so adjudged; and that Case is) a term is devised to one for Life, and after his death to another, which is allowed good, and that they would not go a step farther. So I say, in this Case it must go further than Manning's Case, or any other Case that adjudged to make it void.

William Jones.

The Case is new, and without any express Precedent, and therefore not capable of so certain a determination as would be expected, in Case advice were to be given, whether a Purchaser should deal in the buying of a Lease or not.

Serj. M...d's
opinion 20
Nov. 1682.

Pet though there be no Precedent in Print, yet such like Cases have been determined as guide my Judgment and Opinion to be (scilicet) that as this Case is circumstantiated, Charles hath not, nor can have a right to the trust of the term, the reasons and ground of my Opinion is as followeth.

First, The trust of the term for years in gross, and separate from an Inheritance, cannot be intailed in Possession or Remainder; but yet where there is a term for Years in being, if the Inheritance of the Land be Intailed with Remainders over, there the term may be limited to wait upon the inheritance, according to the several intails; and such limitation is good, so long as nothing intervenes to interrupt or disturb it.

Trust of a
Term cannot
be Intail'd,
yet if the In-
heritance be
Intailed, the
Term may
be Limited
wait on the
Inheritance.

But I conceive is not capable of such Privileges of intail as Inheritance is, for the intail is confirmed by the Statute of Westm. 2d. de bonis; but the attendance of the term upon the Inheritance intailed is not within the Statute de bonis, &c. is but a Creature of the

C

Chan.

Chancery, and in several Cases may be destroyed and barred, though no Fine and Recovery or other Bar be made of the Inheritance.

I conceive in such case if the Tenant in tail alien without Fine or Recovery for valuable consideration, the issue in tail shall avoid the Inheritance, the Chancery shall never help him to avoid the Lease.

In this particular Case it is clear, that neither Charles nor any in Remainder, can recover this term at Law, but only by suit in Chancery; and in Chancery shall never recover where the limitation of such a term in being is not supportable in Common Law, which in this Case it is not, as I conceive; for take the Case without the Contingency, that Henry was tenant in tail, Remainder to Charles in tail, &c. the Recovery suffered by H. would have barr'd Charles of the rest of the term, as well as of the Inheritance.

But the sole Objection here is, that the trust of the term to Henry is expressed, that it shall determine quoad Henry and his issue, in case Tho. Duke of Norfolk dye without issue, living Charles, as in this Case he did.

The strength of this Objection lies in this: first, that the Cessor of the trust is to be upon the death of a Stranger without issue (scil.) on Tho. Duke of Norfolk, on whom the Lands were not Intailed. And secondly, the term is not to cease, but upon the death of Tho. Duke of Norfolk without Issue in the Life of Henry.

As to the first, it will make no difference in Reason and in the polity of the Law, where the Cessor is limited on the death of a Stranger without issue, or of the tenant in tail without heir of his body. For first,

In both Cases the possibility is remote, and not regarded in Law, where a term is so limited, and so were there solutions in Child's and Bayly's Case, and divers others.

This would be a way to set up a perpetuity, as strongly as that it was limited upon the death of the tenant in tail without Issue.

Put the case there be a Father and several Sons A. B. & C. and the Father is seized in Fee of the Reversion of Lands after a Lease of 200 years, he settles the Inheritance upon his eldest Son in tail, with Remainders in tail to his other Sons; and this Lease being in trustees for him at the same time, causes the Lease to be settled in trustees in trust for the Sons, to wait on the Inheritance in trust accordingly, provided that the second Son dye without Issue in the life of the Father or Son, the trust of the eldest Son to cease.

I conceive this would not be maintained in Equity, if the second Son should not alien by Fine and Recovery.

Mic. 17. Jac.
B. R.

As to the second Objection, that the Cessor is on the Death of Tho. without issue in the Life of Henry, whereby the Contingency is reduced to happen in the Life of one person (viz.) Henry, and not at large (viz.) of the Death of Tho. without Issue, I conceive no difference made thereby, and it is in effect the point adjudged in Child and Bayly's Case which was thus: French a term for 76 years, demises to his Wife for Life, Remainder of the Term

Term to W. his Son and his Assigns, Proviso, That if his Son W. dyed without Issue of his Body then living, that T. his Son should have the Term or Interest.

Adjudged then in B. R. which was three Years after affirmed in the Exchequer Chamber by Hobart, Winch, Denham, Hutton, and Jones, that the Demise to Tho. was void. Mic 20 Jac

In that Case the Contingency did expect during the life of W. only as here it is on the life of H. and the Reasons of their Judgments both in the King's Bench and Exchequer Chamber, in effect of all the Judges of England at that time, was because it might tend to make a perpetuity, and that this new invented way of Intailing of Terms is in no sort to be favoured in Law,

In Child's Case 'twas limited, if William had no issue at the time of his decease; in this Case, if Tho. had no Issue at the time of Henry's Death.

But case it had been limited, that Tho. had dyed without issue in thirty or forty, or any number of Years, or if it had been limited that Tho. had dyed without Issue in the Life of Henry, and five or six more persons, it might have been so limited as well as to one Life, and the Law is the same.

It is more Contingent when the Cessor is limited to be upon the death of Tho. without issue in the Life of Henry, than it had been if Tho. had dyed without issue generally; for he may dye without issue, though he dye not without Issue in the Life of Henry.

First, the sum of this is, if such limitation of a term as this is, be not good at Law, the trust of a term cannot be good in Chancery.

Secondly, the general scope of the Settlement of the term was, that the term should wait on the Inheritance in tail, which now cannot be because it is altered.

Again, if the Law should be otherwise, that Charles have the whole Term, then those in Remainder shall be utterly defeated of it, and shall not go to Charles his Son and Heir, but to the Executors, which never was intended by the Deed. M----d.

I conceive, that notwithstanding the late Judgments in Chancery have been, that if a Term of years be limited by way of Trust, or otherwise, to any person and his Heirs Males, with Remainders over. or other limitations to any other persons, those Remainders and limitations are void, and the whole term shall be to that person and his Executors and Administrators, to whom it was first limited in tail; yet this Case is different from all those Cases, by reason this was only a Temporary Provision as to Mr. Henry Howard, until that Contingent of the death of the Duke of Norfolk should happen, and then absolutely to cease as to Mr. Henry Howard. And then the Trust of the term is declared to be for the preferment of the younger Sons as is above expressed; and albeit that Marriot hath in plain breach of Trust by his Assignment, enabled the now Duke to destroy the term in point of Law, yet the Chancery may subject the Lands during the

Opinions and Considerations for the younger Brothers. Sir J. C....

the Remainder of the term to the Trustees for the younger Children, as agreeable to the intention of the Deed of Trust. and to all Honesty and Equity, and that Equity I take it is in no sort barr'd by the Fine, if a Bill be exhibited in time. J. C. 8. Jan. 1677.

Sir R. S.

I concur with this Opinion, because it is no absolute Trust, not so much as for the life of Henry, but a limited Trust upon a Contingent, which as in its Creation it might, so in fact, it did happen in the life-time of Henry; and consequently there is no room for any Construcion to be made, that the Trust of the whole term vested in Henry against the express limitation thereof. R. S.

Mr. Offey.

I conceive, first, that if by Ad executed my Lord of Arundel had created this term to my Lord Dorchester, and the rest of the trustees in trust for Henry Howard in tail, and after his death to the Brothers in tail, that had been a perpetuity, and not good for a term; though as to that, there is a difference taken in Tatten and Moltenex Case, More 809, 810. in Chancery, by the Lord Chancellor, and the Judges assisant; which seems to be reasonable, that the first party that is the Cestui que Trust against his issue, may dispose of it, but not against him in Remainder; for Equity preserves it as to the Remainder, so then if it had been to Henry Howard and the Issues of his body, the Remainders to the Brothers: Though Henry Howard could, as to his Issue, dispose of it, yet as to his Brothers it stood good, if that Resolution holds good, and the Book says it was groundd upon precedents in that Court too. But this case differs where the course of Equity is against it; therefore, first there is only by this Conveyance a reception of the profits in Henry Howard and the Issue Male of his body, until the Dignity of Arundel come to him. And it is not in trust for him and his Issue Male; so as he has not the entire trust in him, as the other Sons have by the penning of the Deed. Secondly, 'tis not absolutely in trust in him and his Issue Male, but temporary in them, upon the failing of the Dignity of Arundel sooner or later, And he is not a Cestuique Trust within any of the Statutes preceding the Statute of Uses, but has but a limited pursuance of the profits; but the trust vests compleatly in the Brothers after. Thirdly, then the Marquis of Dorchester assigns the term to Marriot, and he assigning to H. H. whereby he has in strictness of Law extinguished it, whereby there is a wrong and deceit done to the Brothers, he is bound in Equity and good Conscience, to make them recompence and satisfaction for this wrong; and it appearing that H. H. was privy to this, with a design to extinguish it, and that extinguishment turning to his advantage, he is likewise compellable in Equity to answer it out of his Estate, either by creating a new Term in this Land, or by some other way, according to the Resolution of the Judges in my Lord of Ormond's Case, Hubbard 350.

I have seen the Opinions of Mr. Attorney-General, Serj. May-^{Sir W. Ellis.}nard, and Serj. Pemberton, whose Opinions I do much value, and have great esteem for. Mr. Attorney saith, that the Term to H. H. and the Heirs of his body, under other Limitations than the Inheritance was, the whole Term vested in H. H. and the Limitations thereof to the other Brothers are void, I conceive the whole trust of the Term is not limited to H. H. but part of the Trust, so long as Thomas the deceased Duke shall have Heirs Males of his body, and until the Earldom comes unto him; so as the Trust is but a qualified and limited Trust in H. H. so as this Trust to H. is now ended by way of Limitation to H. H. and then there is a new Trust springs and arises to the younger Brothers, not by way of Remainder of a term, but the Trust to H. H. being ended and determined, I conceive a new one may well arise and spring up to the younger Children, admitting it were a trust of a term in Gross it is not a Remainder, but a future Contingent grant and a limitation to them, as it is in Pell and Brown's Case.

A Trust ending by way of Limitation, and a new Trust springing.

Secondly, If it be to attend the Inheritance, then he conceives clearly, the Recovery having barred all Remainders, the Term and the Trust of the Term is also barred. If this Trust had been to wait upon all the Estate as they came in possession, it had been the stronger; but as this Case is, I conceive the Trust will wait upon the Estate of H. H. for so long as Tho. lives, and hath Heirs Males of his Body, and until the Earldom come unto him, and the Trust of Henry determines, and then a new Trust springs up to the younger Children, which is a future contingent Trust, so as a common Recovery can bar this Trust, so long only as they did wait upon the Estate of H. H. which is now determined by a collateral Limitation, and the Recovery cannot enlarge the Trust to H. H. and make that to continue which in its Creation was to end when such a Contingent happens, which hath now happen'd; if H. H. had not suffered a common Recovery, he had had an Estate-tail, yet no Trust, this is a future contingent Trust to the younger Children, which cannot be barred by a common Recovery.

W. Ellis, 8 Martii 1677.

1. The Surrender or Grant of the Lease for 200 years to Henry, ^{Serj. M. d. for the Brothers.} nor the Extinguishment of the legal Interest of the Term, doth not prejudice the equitable Trust of the Term, so long as the Lands come not into other Hands (viz.) of a Purchaser, without notice of the Trust, which is not in this Case.

2. An Intail cannot be made of a Term in Gross, as if a Lease for 1000 years be made in trust for J. S. and the Heirs of his Body, with Remainders over, J. S. may dispose of the whole Term, and such Disposal is good against his Issue and those in Remainder; and if he die without such Disposition made by him, his Executors shall have the Benefit of the Trust, and not his Issue or the Remainder. ^{An Intail cannot be of a Term in gross, but may be disposed, and if not, shall go to Executors.}

But a Term
may be limited to attend
the Inheritance in trust,
be it in fee or
tail; and
there the heir
shall have the
benefit.
Yet if Debts
be, the Executors
shall have it.

Term, in
Law, well alienated
without Fine
or Recovery.

3. But a Term may be limited to attend and wait on the Inheritance by way of a Trust, as if a long Term of Years be, the Reversion in Fee, if the Reversion be purchased in Fee, or settled in Tail, the Term may be settled to the use of the Fee or Tenant in Tail; and in that case, if the Tenant in Tail die, or the Tenant in Fee die, the Heir or Issue shall have the Benefit of the Trust, and not the Executors, &c.

4. But in that Case, if the Tenant in Fee die in Debt, and no other sufficient Assets to pay the Debt, in that Case the Executor shall be preferred before the Heir, although the Debt be such as the Heir is not bound or liable unto.

5. And I conceive, that in that Case, if the Tenant in Tail, that hath the Equity of a Term waiting on it, do purchase the Term and alien, or obtain the Trustee of the Term to make an Alienation of the Term, it shall bind the Issue in Tail and him in Remainder, though the Alienation be by Deed without Fine or Recovery, because the Term in Law is well aliened without Fine, &c. And the Statute of Westm. 2d de bonis extends not to a Case of a Term.

6. Yet it is true this doth not absolutely determine the Case in question upon three Accounts.

First, It is a new Case not yet brought in question.

Secondly, Because here is a springing and a new Trust by accident subsequent, and alters the Trust, and changes the Intail of the Term to other Persons, from Henry to the younger Children, and on such Accident takes away the Trust wholly from Henry the first Tenant in Tail.

And Thirdly, the Change seemeth to be grounded on great Reason; for the Lord Maltravers being in such Condition as he was in, there was great Reason to disable him and provide for the younger Children, as is done by this Case; and if Henry should come to be Earl, and have Addition of Estates, that the other younger Children should also have Accession of Estate to them, and so it is by this Deed of Trust provided.

But notwithstanding these Reasons, and this difference of the Case in these Circumstances from other Cases already resolved, and the contrary Opinions that I have seen, I am rather of the Opinion, that in this Case the younger Brothers are bound by the Recovery suffered by Henry, than convinced that they are not bound; for I find that the Reasons given e contra, touch not my Doubt fully.

The Reasons of my Opinion are (viz.)

1. For the Recovery suffered, and the Time when it was suffered (to wit) before the Lord Maltravers died; for till he died, Henry was Tenant in Tail, and had Power by a Recovery to bar and dispose of the whole Inheritance, as well of his own Estate Tail, as of those in Remainder: The Term of Years was but necessary to serve and attend the Inheritance which was principal.

2. And the only Reason that made such intailing or limitation of the

the Term good, was, because it was to wait on the Inheritance, first to Henry in tail, and so successively to the other Brothers; or else, as it is abovesaid, the Limitation had not been good: And when that Reason fails, and the Cause why it was a good Limitation ceaseth and is taken away, the Effect of it doth likewise cease.

3. The change of the Term into thirds, doth not change the Estates tail of the younger Brothers, and cannot stand with the intention of the Deed of Trust: For I think it clear, if Charles, admitting he come to the Inheritance as Owner, or if in the Life of Henry he could get a Tenant of the Freehold of all, or any part of the Land to join with him, should then suffer a Recovery, it would bar Edward, Francis, and Bernard, of so much of the third part whereof such Recovery should be suffered, viz. of the whole Inheritance, and a third of the term and the residue (to wit) the other two parts would respectively cease, and be intailed as to the term, and be wholly in the respective Disposition of Edward and the rest, and go to their Executors, not to their Issues or the Remainders.

And yet upon long Consideration of the Case, there is another, and a further Ground of my Doubt of what hath been said (viz.) not only because it is a new Case, and concerneth a Great and Noble Family, but on another and further Ground observed and insisted upon by such great Opinions, contrary to what I have above observed (viz.) that it is not only a springing and contingent use to the younger Brothers, respecting them, but because the Original Trust to Henry, viz. that the Trust to him and his Issue is, as to him and them, under a Limitation; and that not so long as he the Tenant in tail shall have Issue, but so long as the Lord Maltravers shall have Issue Male, and on that reason the Case is more doubtful.

M---d.

1. I agree, that if a Man have a term for 1000 Years, and he grants and demise this to one and the Heirs Males of his Body, the Remainder to another and his Heirs, that this term cannot be intailed, nor a Remainder limited upon it; and that upon the Death of the Party to whom the term was so given, it shall go to his Executors as a Chattel, and not to his Heirs Male.

Sir W. E. &c.
A Term of 1000 years cannot be intailed nor a Remainder limited of it, but shall go to Executors.

2. I do conceive it will not be denied by any, that if there be a long term for years, for 1000 years, more or less in trust, and a man purchases or settles the Inheritance to the use of himself for life, the Remainder in Tail, the Remainder in Fee, and declare that the trusts of the term shall wait upon those Estates, and fall in with them, but that this trust of the term shall go along with all the Estate, and shall not be merged in any of them, and this trust shall not go to an Executor, but shall go along with the Estate, and if the tenant in tail die without Issue, it shall go along with the next Remainder Man in tail, and after his Death without Issue, it shall go to him in Fee simple, and attend all the Estates in Remainders, be they never so many. And this, I conceive, is the common Course in Chancery to incorporate

Yet a trust of such a long Term may wait on, and go along with the Inheritance, &c.

such trusts to go with all the Estates. This is not an absolute Trust for Henry and the Heirs Male of his Body, but a limited and qualified Trust as long as Duke Thomas's elder Brother lived, and hath Heirs Males of his Body, and until the Earldom of A. doth come unto him; so as by the Death of Duke Thomas without Issue, the Trust to Henry, which was but a limited Trust, is now determined and banquished as to Henry.

As this was a contingent trust in Henry, but in case Tho. was alive, and had Issue when the term was to begin, so the continuance and duration of the trust of the term, was but to last until the Earldom came unto him; and it is the stronger, for that this trust ends in Henry by way of Limitation.

Query.

How long shall Henry and his Issue have this Trust?

Answer.

Until Thomas die without Issue Male, and the Earldom of A. come unto him, both which hath happened, so as the trust for Henry and his Issue is ended by way of Limitation, and is now disposed over to others, as it may well be so, as this is a new Trust that by a contingent subsequent Declaration takes away the trust from Henry, and settles a new Trust in the younger Children; and it is to be considered, that Henry is to have the trust of this term, not so long as he shall have Issue, but so long as the Lord Maltravers shall have Heirs Male, so as that makes it a collateral Limitation or Determination of the said Estate.

4. The Equity and Justice of this Trust carries much weight with me, and that condition the Lord Maltravers was in: It was fit to settle the trust in Henry, so long as the Lord Maltravers had Heirs Male of his Body, and if they failed, and that the Earldom of A. and great accession of Estate to come to Henry, it was a great reason that the younger Children should be provided for and taken notice of.

And it will not be easie to blow off and overthrow a trust in a Court of Equity, contrary to the express mind and intention of him that made it, for the Provision of the younger Children, especially it being made with so much Justice and Reason, wherein he hath both a Respect for his Honour's Family and younger Children.

Obj.

There is one Objection against all I have said, which seems prima facie to carry weight with it; and that is, when the legal Interest is come to Henry, and he is Tenant in tail in possession, and suffers a common Recovery, and bars all the Remainders in tail.

Query.

How can this trust which is an Accessary follow Estates?

Answ.

To which I answer first, If the Trust had been to follow and wait upon the Estate, this Objection had been the stronger; but this trust is not absolutely to wait upon Henry's Estate, but so long as Duke Thomas hath Heirs Male of his Body, and until the Earldom of A. come to him, both which are happened, he continues still Tenant in tail. and yet this Interest is determined in the trusts.

A future contingent Interest cannot be barr'd.

Secondly, this is a future contingent Interest that now is happened to the younger Brothers, which cannot be barred, and it may be resembled to Pell and Brown's Case, 2 Cro. 590, 591.

A Man deviseth his Land to his second Son Thomas and his Heirs, and if he die without Issue, leaving William his elder Brother, then William should have it in Fee; it was adjudged that this was a Fee Simple in Thomas the second. And though regularly one Fee cannot descend on another; yet this being a future contingent Interest that the Devise of the Fee Simple to William his eldest Son, was good.

Another great Question was, Thomas the second Son suffered a common Recovery, whether this did not bar the future contingent possibility of William?

And it was adjudged it did not.

Now here is as much a future contingent possibility of a Trust, as there was of an Estate and more, and therefore there is much reason that the future contingent possibility of a Trust should not be barred by a common Recovery, as in that Case. And as to that which is said, that an Accessary cannot be without a Substance, and the Estates of the younger Children is to succeed, and yet they have no proper Estate, for Henry is now Tenant, so as this is a personal trust for the younger Children independent of their Estates; and if so, then clearly this Recovery cannot bar their Estates.

Another reason why a Court of Equity should help and interpose in this Case, may be, because the Estate for Years was conveyed by Marriot in breach of the Trust, which a Court of Equity ought to maintain and support as much as they can.

First, Because Marriot and the now Duke are not Purchasers for a valuable Consideration.

Secondly, They came in with privity, and had notice of the Trust.

And I conceive may and will, notwithstanding these Acts, make good these Trusts for the younger Children; and if this be a new doubtful Case, certainly I conceive it is the surest and safest way for a Court of Equity to make good the intention of him that made it, and to preserve the Trust for the younger Children.

Breach of
Trust re-
liev'd in a
Court of
Equity,

to make good
the Intention
of him that
made it.

William Ellis, 26 Feb. 1677.

E

De

*De Termino S. Hill. Anno Reg. Car. 2^d Regis
XXXIII & XXXIV Anno Dom. 1681.
Martis 24 die Jan. in Curia Cancellarii.*

Howard, versus le Duc de Norfolk, & al'

This day being appointed for Judgment in this Cause, the three Judges assisted the Lord Chancellor at the hearing, viz. the Lord Chief Justice Pemberton, the Lord Chief Justice North, and the Lord Chief Baron Montague, came into the Court of Chancery, and delivered their Opinions Seriatim, beginning with the Lord Chief Baron Montague, and so upwards; after whom the Lord Chancellor also delivered his Opinion: The Sum of all the Arguments, as near as could be taken, were as followeth.

The Argument of the Lord Chief Baron Montague.

Charles Howard is Plaintiff, and the Duke of Norfolk and others are Defendants. The Plaintiff by his Bill seeks to have Execution of a trust of a term of 200 Years of the Barony of Grostock, which was made by Henry Frederick Earl of Arundel, and upon the Bill, Answers, Deeds, and other Passages in this Cause contained, is this:

The Case.

Henry Frederick Earl of Arundel by Lease and Release of the 20th and 21st of March, 1647. did settle the Barony of Grostock and of Burgh, and several other Lands to himself for Life, then to the Countess Elizabeth his Wife for Life, and then there is a term created for 99 years (which we need not mention in this Case, because it is determined) and after the Death of the Countess, there is a term of years limited to my Lord of Dorchester and other Trustees for 200 years, under a trust to be declared in a Deed of the same date, with the Release and the limitation of the Inheritance, after this term of 200 years, is first to Henry Howard now Duke of Norfolk and the Heirs Males of his Body, then to Mr. Charles Howard the now Plaintiff, Brother of the said Henry, and so to all his Brothers successively in tail Male, with the last Remainder to the Earl of and his Heirs, then by a Deed 21 of March 1647, the Earl declares the trust of the term of 200 years, reciting first the uses of the former Deed, and therein says, it was intended that the said term should attend the Inheritance, and the Profits of the Barony of should be received for 200 years by Henry Howard now Duke of Norfolk and the Heirs Males of his Body, so long as Lord Thomas, eldest Son of the said Earl of Arundel, or any Issue Male of his Body should be living; but in case he should
die

die without Issue Male in the Life of Henry Howard, not leaving his Wife enſient with a Son, or in caſe after the death of Thomas without Issue Male, the Honour of the Earldom of Arundel ſhould deſcend to Henry Howard, then he and his Iſſues to have no benefit of this term of 200 years, but it was to deſcend to the other Brother Charles Howard the now Plaintiff as hereafter is mentioned; and then comes Now this Indenture witneſſeth, and therein the Earl declares that it ſhould be under the Limitations after ſpecified (viz.) if Thomas Lord Howard had any Issue Male or Heirs Male of his body (living Henry Howard) then the Truſtees ſhould have the commencement of the term in truſt for the ſaid Henry Howard, and the Heirs Males of his body, till ſuch time as the Earldom ſhould come to Henry Howard, by the death of Thomas without Heirs Males of his body, and after to the other Brothers ſucceſſively, and the Heirs Males of their Bodies; and then doth divide the other Manors with croſs Remainders to the five Brothers, then the Caſe goes on thus; the Earl of Arundel dies in time in 1652, Elizabeth the Counteſs dies in 1673, then in 1675, my Lord of Dorcheſter, the ſurviving Truſtee, aſſigns the Term to one Marriot, he aſſigns it to the now Duke of Norfolk, and the Duke the 24th of Octob. 1675, by Bargain and Sale makes a Tenant to the Preſcipe, and then a Recovery is ſuffered, and the Uſes of that Recovery 25th of October are declared to be to the Duke and his Heirs. Then Tho. Howard the former Duke died without Issue, having never been married, and that is in the year 1677. whereby the Honour came to the now Duke, and ſo the Plaintiff's Bill is to have execution of the truſt of the term of the Barony of to the uſe of himſelf and the Heirs Males of his body. This I conceive was oppoſed by the Counſel for the Defendant upon theſe Grounds:

1. That by the Aſſignment made by Marriot to my Lord Duke Henry, the term was ſurrendered and quite gone.
2. The ſecond ground was the common Recovery ſuffered, which they ſay barred the remainders which the other Brothers had, and ſo alſo would be a bar to the truſt of this term.
3. And the other ground was, that the truſt of a term to Henry and the Heirs Males of his Body, until by the death of Thomas without Issue, the Earldom ſhould deſcend upon him, and then to Charles, is a void Limitation of the Remainder.

As to the firſt, that by the aſſignment of Marriot to Henry Howard, the whole term was ſurrendered; and being ſo ſurrendered, hath no exiſtence at all that I find, but was barely mentioned, and I think cannot be ſtood upon; for this the term by the ſurrender is gone indeed and merged in the Inheritance, yet the truſt of that term remains in Equity; and if this truſt be deſtroyed by him that had it aſſigned to him, this Court has full power to ſet it up again, and to decre^e the term to him to whom it did belong, or a recompence for it, therefore I think that ſtands not at all as a point in the Caſe, or as an objection in the way.

A Term may be ſurrender'd by Truſtees, and merged in the Inheritance, yet the Truſt remains in Equity, and the Chancery may ſet it up again.

As

A Term attending the Inheritance barr'd by a Recovery,

but not a term in gross, and a collateral thing.

The Devise of a Term, and Limitation of the Trust of a Term to one and the heirs of his Body, good: but a Limitation over after his Death without Issue, void.

As to the next thing, the common Recovery now suffered by the now Duke, that doth bar the remainders to the other Brothers; and so also the trust of this term: That I conceive to be so, in case this can be interpreted to be a term to attend the Inheritance; and indeed in the reciting part, the Deed doth seem to say, that it was intended to attend the Inheritance. But by that part of the D^d which followeth after (now this Indenture witnesseth) there it is limited, that the term should be to Henry Howard and the Heirs Males of his Body, until such time as the Honour of the Earl of Arundel by his elder Brothers death without Issue, should come to him; then to the Plaintiff, which doth convey the Estate of the term in a different Chanel, from that in which the Inheritance is settled; and taking this D^d altogether, it doth limit this term in such various Estates, that it can no way be construed to be a term attending the Inheritance; and then, I conceive, the recovery doth not bar the trust, for the recovery would bar the incident to any Estate, as this would do here, if it attended the Inheritance; but being only a term in Gross, and a collateral thing, I conceive the recovery has no operation to bar the trust in the term. Then the Case singly depends upon the third point, whether the Trust of a term thus limited to Henry Howard and the Heirs Males of his body until his Brother die without Issue, whereby the Honour came to him with such contingent Remainders over, be a good Limitation, this is the Question, and so in short the Case is thus: A Term of two hundred years is granted in trust, that Henry Howard and the Heirs Males of his body shall receive the Profits until Thomas die without Issue Male of his body, and then to Charles Howard, and the Heirs Male of his body: And in this case, I am of Opinion, that these Limitations to the younger Brothers upon this Contingency, are absolutely void in the first Creation, and are gone without the Surrender; and that upon this Recovery Henry Howard, now Duke of Norfolk, ought to have the trust of the whole Term.

The Expositions of Devizes of Terms, or the Dispositions of the trust of terms, have proceeded by many steps to higher degrees than was at first thought of by the makers. It would be too long to give a distinct History of it; but it is so plain, that it is now a resolved and decreed thing and settled, therefore it were in vain to tell you the Steps taken towards it. That the Devize of a term, and the limitation of the trust of a term to one and the Heirs of his body is good, though Burgesse's Case was only for Life, the Cases are very full in it. On the other side, where there is a Limitation of a Term to one and the Heirs of his body, there a positive Limitation of the Estate over, after his death without Issue, that I think also is as fully declared to be void. I shall not cite Cases at large, but only those Points and Expressions in them which are peculiar and pertinent to this purpose: there is Jenkins and Kennish's Case, I think it was in the Exchequer, there it was said, it was such a total Disposition of the term, to limit it to one and his Heirs Males, that it would

would not admit of a Limitation over, but adjudged to be void. So in my Lord Roll's Abidgments, 1 Part Tit. Devise fol. 611. 11 Car. 1. Leventhorp and Ashby's Case B.R. It is said, that the Remainder of a term to C. after it is limited to B. and the Heirs Males of his Body, is a void Remainder; and fol. 613. he puts down the Reason why the Remainder is void, because the Limitation to one and the Heirs Males of his Body is a full Disposition of the Term. And if such Limitations over were permitted, it would create Perpetuities, which the Law doth abhor.

Sanders and Cornishe's Case, Croke fol. 230. There it is resolved, that the Devise of a Term in such a manner with Limitations after one another, to make a perpetuity, cannot be good: For, says the Book, to limit a possibility, and to limit the Remainder of a term, after a dying without Issue, stands not with the Rules of the Law. Now to bring this Case within these Rules, that if there be a Trust of a term to a Man and the Heirs of his body, no Limitation can be over. I say then, if this Estate be so limited to my Lord Duke by the name of Henry Howard, the other will follow when there is a Limitation in tail, (though it cannot be properly tiled in tail of a Term, yet it is a Disposition of that Term as long as the Tail lasts) then there can be no Limitation over. And as to that I think, as the Deed is penned, it may well be stood upon, that here is an Estate given to Henry and the Heirs Males of his body: For though the Deed says, until by the death of Thomas without Issue, the Earldom of Arundel shall descend upon him; yet the first Limitation, I think, shall stop at the Heirs Male of his Body, and the Remainder over shall be then void. But I will not stand upon that, because I think I shall not need it, but admit (until by the failure of the Issue of Thomas the Earldom come to him) makes it not an Estate to Henry and the Heirs of his body directly, yet it gives an Estate to him and the Heirs of his body, as long as Thomas has any Issue of his body, and that I count to be all one as to the Operation of Law; for each of the Estates must determine upon the Person's dying without Issue, which is too remote a Condition to limit the Remainders of a Term upon. And this until he die without Issue, and as long as he shall have Issue, are terms Synonymous in my Opinion; and so, it being a Limitation to him and his Heirs of his Body, as long as Thomas liveth, and hath Issue of his body, it cannot be limited over, and the rather upon comparing the former part of the Deed, where there is an Expression, that it was intended the Estate should remain in my now Lord Duke, so long as Thomas lived, or had any Issue of his body. Therefore, I say, there being in my opinion no difference as to operation of Law, between the Limitations to a Man and the Heirs of his own body, and to a Man and the Heirs of his body during the life of another, and the Heirs of his body, there can be no difference in the Resolution. It is as possible a disposition of the Term during the continuance of an Intail as the other, and therefore no Remainder can be limited over.

Limitations over would make a Perpetuity, which the Law abhors, and stands not with its Rules.

A Term tho' not properly intail'd, yet 'tis a Disposition of the Term as long as the Tail lasts.

A Limitation to a Man and the Heirs of his Body, and to a Man and the Heirs of his Body during the Life of another and the heirs of his Body, no difference.

f

But

Cro. Ja. 459.

Cro. Ja. 461.

A Term limited to Daughters upon the Sons dying without Issue, the Son dies without Issue, the Daughters his Executrixes, the Term Assets.

But now the doubt in this Case, that is made, ariseth upon this Point, that this Limitation over to the Brothers, is upon a meer Contingency, and whether that be good, I think, is the main Question. And truly upon the reasons of Child and Baily's Case, I cannot think it is a good Limitation; that Case has been so often reported, that I need not put it at large. In short, this it was; A Devise by A. of a Term to William his eldest Son and his Assigns; and if he die without Issue, then to Thomas his youngest Son: there the Judges of the King's Bench did first deliver their Opinion, that this was a void Limitation to Thomas. And after it came into the Exchequer-Chamber, and there, by the Opinion of ten Judges, it was affirmed, and the reasons of the Judgment are not what was alleged at the bar in this Cause; but they went upon the ground, because thereby a perpetuity would ensue; and that which was observed by one of the Counsel, that the Term was given to him and his Assigns, was only an Answer to a Case put in the Argument upon Child and Baily's Case, which was the Case of Rhetorick and Chappell, Hill 9. Jac. R. 889. B. R. which was cited by my Lord Chief Baron Tanfield, against the resolution of Child and Baily's Case, to difference it from the Case then before them. And though it was urged in Child and Baily's Case, that it was given upon a Contingency to the younger Son, which would soon be determined, and end in a short time; yet that weighed not with the Judges, but that they ruled it to be a void Limitation; and I met lately with a Judgment in the Common-pleas, which crosseth the Case of Rhetorick and Chappell; it was Hill. 31. and 32 Car. 2. Reg. 1615. Gibson's and Sanders's Case; Matthews possessed of a long term of years, having Issue a Son and three Daughters, makes his Will, and devises his Chattel-Leases to his Son; and if that Son die before Marriage, or after Marriage without Issue, that then they should go to the Daughters. The Son doth marry, and dieth without Issue, the Daughters his Executrixes, against whom an Action of Debt is brought upon a Bond, they plead no Assets; and upon a special Verdict, the Question being whether this were Assets in their hands, it was adjudged it was.

In the report of that Case, there are many expressions of the Courts unwillingness to extend these Devises and Dispositions of Terms, further than the Judges had gone already. The authority of this Case doth much strengthen the authority of Baily's Case, because it doth thwart and oppose the Judgment in Rhetorick and Chappell's Case.

There was also started at the Bar in Pell and Brown's Case, that a Fee upon a Fee, arising upon such a proximate Contingency, as might happen in so short a time as a Life, was a good Limitation. It is very true, that Case is so adjudged; but I think there might be such reason of difference urged between the Disposition of a Fee-Simple and of a Term; for a Fee may be qualified as to a Man and his Heirs until a Marriage take effect; but the qualifying of a disposition of a Term cannot be, because when once a Term is given, the qualification comes too late.

I do think that there have been Cases in this Court, where a Term has been limited to one and the Heirs Males of his Body, upon a Contingency, to happen first with Limitations over, if that Contingency do not happen, that has been a good Limitation. As thus: If it be limited to the Wife for Life, and then to the eldest Son, if he overlive his Mother and the Heirs Males of his Body, the Remainder over to a younger Son, there if the eldest Son die in the Life of the Mother, the Limitation to the second Son may be good. But if there be an instant Estate-tail created upon a Term, with Remainders over, though there be a Contingency as to the Expectations of him in the Remainder, yet there is such a total Disposition of the Term, as after which no Limitations of a Term can be. For that Objection out of Pell and Brown's Case, there is no such sure Foundation to build upon in the Point of a Term, because that Case it self has been controverted since that Judgment given, in a Case between Jay and Jay, in Stiles's Reports, 258 and 274, Trinit. 1651, fol. 258. 'Tis thus: A Man seized in Fee devised it to one and his Heirs; and if he die during the Life of his Mother, the Remainder to another and his Heirs.

There is no Opinion given; but Rolls Chief Justice said, A Limitation of an Inheritance after an absolute Fee-simple, is not a good Limitation, because this would be to make a Perpetuity, which the Law will not admit; but if it be upon a contingent Fee-simple, it is otherwise: But fol. 274. where it is spoken to again by Latch, he argued, that it was not a good Limitation; and though he doth cite and confess Pell and Brown's Case to be adjudged quite contrary to what he argued, yet he tells you, that the Judges did find such Inconveniencies arising upon it, that the Court was divided upon a like Case; and says further, that within nine years after that Judgment, 21 Jac. it was made a flat Query in the Serjeant's Case; and adds moreover, that it hath been ever since disputable, and cites a Case, and gives you a Roll, but not the Parties Names, Mich. 37 and 38 Eliz. C. B. Rol. 1149. wherein, says the Book, after solemn Arguments both at Bar and Bench, it was adjudged quite contrary to Pell and Brown's Case: But admit that Case to be good Law, where will you stop, if you admit the Limitation of a Term after an Estate-tail, where shall it end? For if after one, it may as well be after two; and if after two, then as well after twenty; for it may be said, if he die within 20 Years without Issue, and so if within 100; and there will be no end; and so a Perpetuity will follow. It was said at the Bar, it will be hard to frustrate the Intention of the Parties: To that I answer, Intentions of Parties not according to Law, are not to be regarded. It was the Intention in Child and Baily's Case, that the younger Son should have it; and so in Burgess's Case, it was the Intention the Daughter should have it; and so in Gibson's and Sommers's Case, it was intended for the Daughters; yet all these Intentions were rejected; and therefore as to that, it is not at all to weigh any thing in the Case.

Limitation of an Inheritance after an absolute Fee-simple, not good, *scilicet*, if upon a contingent Fee-simple.

Intention of Parties not according to Law, are not to be regarded.

It

It has also been objected, but then here is a contingency that has actually happen'd upon Thomas's death without Issue, and so the Honour is come to Henry, I say the happening of the Contingency is no ground to judge.

The Limitation good upon it, was not good if the other Limitation had stood out, and that I conceive is our Case. So then for that I think these Expositions have gone already as far as they can; for my part I cannot extend it any further, and therefore I conceive in this Case, the Plaintiff has no Right to this Term, but the Decree ought to be made for the Defendants.

The Argument of the Lord Chief Justice *North*.

The only
Point.

I shall not trouble your Lordship to repeat the Case again, for it has been truly opened by my Lord Chief Baron, nor shall I trouble you with any long Argument, because I think there is but one point in the Case, and that a short one: The only point is this, Whether this contingent Trust of a Term limited to Charles, upon the dying of Thomas without Issue Male, whereby the Honour did descend to Henry, be good in point of Creation and Limitation; for the other two points will not trouble the Case: For as to that point of the Recovery, in case this be not a good Limitation in point of Creation, it will make nothing in the Case, for it is gone without the Recovery. In case it be good in point of Creation, the Recovery will do nothing; for that supposeth it to go along with the Inheritance: And if this take effect, then it will suffer no prejudice by the Recovery. Then for the Assignment of Marriot to the Duke, that signifieth nothing in the Case; it doth indeed shew, that if your Lordship shall decree this Cause for the Plaintiff, then he hath committed a breach of Trust; but if for the Defendant, then it is of no weight at all. If the Law be for the Plaintiff, then he must answer for this breach of Trust, and so must the Duke; for it is a Surrender to a person that had notice of the Trust. So that the Question is barely upon that single first Point, whether it be a good Limitation upon the Contingency to Charles, this which they call a springing Trust. My Lord, I take the Rules of this Court, in cases of Trusts of Terms, to be the same with Rules of Law in Devises of Terms: For I conceive the Rules of Law to prevent Perpetuities, are the policy of the Kingdom, and ought to take place in this Court, as well as any other Court. So I take it then, that the Trust of a Term is as much a Chattel, and under the consideration of this Court, as the Term it self; and therefore I cannot see, why the Trust of a Term upon a voluntary Settlement, should be carried further in a Court of Equity, than the Devise of a Term in the Courts of Common

The Rules of
Law to pre-
vent Perpe-
tuities are
the Policy of
the King-
dom.

Common Law. It is true, where there is a long Term in being upon Mortgage, and as a security which is determined, it is of great conveniency that it should be kept on foot to protect the Inheritance; and so it will lie still to wait upon the Inheritance, and thereupon in many Descents it will go from Heir to Heir, and that upon a particular consideration, to attend and protect the Inheritance: But for a meer Chattel to go from Heir to Heir, is not the same case; nor do I see any reason why this Court should carry such a Chattel any further, than Devises of Terms are carried at Common Law.

A long term upon a Mortgage fit to be kept a foot to protect the Inheritance, and wait upon it.

Now let us see, and a little consider, what those Rules are, and how they are applicable to this Case: In both cases a Term may be limited for life to one, with Remainders over, though in the bare consideration of Law, an Estate for life is a greater Estate than a term for years; but in case of an Estate-tail there can be no such thing; therefore in Burgess's Case, the Trust of a Term is limited to A. for Life, the Remainder to his Wife for life, the Remainder to the first, second, and other Sons successively, and the Issue of their bodies: and for default of such Issue, to the Daughters of A. and their Issue, the Remainder to the right Heirs of A. A. had no Son at that time living, nor after; but the Remainder over was to the Daughter of A. in being. It was strongly urged, that the Daughter should have the Trust vested in her, and that the Trust for the Daughter should close with the Estate for life till A. should have a Son. But because there was a Limitation to the first Son of A. and the Issue of his body, and the Remainder of the Daughter was but to take place, after that Son died without Issue, and so the others thought it was not to a Son then in being. But his Estate was in contingencies which did never happen, yet the Court did not allow of any such thing, as any Remainder that the Daughter should have, but made a Decree for the Execution of the Devise; so that it is clear, there can be no direct Remainder of the Trust of a Term upon an Estate-tail.

Mod. Rep. 115.

The Question then is, whether there can be any contingent Remainder for this, for this Case depends upon that consideration; i.e. it is limited upon a Contingency, if such a thing should happen in the life of a Man, and so it is a springing Trust and good that way. My Lord, I take it in this case, where there can be no direct Remainder, there can be no contingent Remainder, though it happen never so soon: Therefore, if a Term be limited to one and his Heirs of his body, and he die without Issue of his body within two years, the Remainder over, there can be no such Remainder limited at all, and therefore no contingent Remainder; for this Remainder is limited at the end of an Intail, and that is so remote a consideration, that as the Law will not suffer a direct Remainder upon it, so upon a Contingency neither.

Where there can be no direct Remainder, there can be no contingent Remainder, Denny'd infra.

Now in this Case there is only this difference, if the Estate-tail in this Term had been limited to my Lord Maltravers, as 'tis here

A Man's dying without Heirs, in the Intention of the Law, no Contingency. An Estate for Life is of longer duration, in Judgment of Law, than a Term for years.

to Henry Howard and the Heirs of his body; and if he die without Issue in the life of Henry, &c. then the Remainder over, then it had been clear the Contingency had been limited upon the expiring of the Intail; and though it be said that it expires within the compass of the life of a Man, yet that helps not in this Case at all, as I conceive; for I will put a Case upon a Fee-simple (upon Pell and Brown's Case.) A Man limits an Estate in Fee-simple to a Man and his Heirs, and if he die without Heirs during the life of J. S. then to J. D. this is void, and the Lord shall have it by Escheat, and that (though it be brought within the compass of the life of a Man) shall never be a good Limitation: And if that Case of Pell and Brown had been, that a Man devised Land to a Man and his Heirs, whereby it would appear, that it was intended the Devisee should have had a Fee-simple, with a Remainder over upon a Contingency; I take it, this could not be good by way of executory Devise, because a Man's dying without Heirs, which to lose his Fee-simple he must do, comes not under the intention of the Law as of a Contingency. An Estate for life, in the judgment of the Law, is of longer duration than a Term for years; and the Rule in Child and Baily's Case is firm, that the expiring of the Limitation of a Term in Tail without the life of a Man, will not make good a Limitation of the Remainder over, which I hold to be a good Rule, and the reason of it, I conceive, will reach to this Case: For what is the difference? here is a Contingency indeed: but it is to have an Estate-tail expire within one Life, which I take to be the same case. Suppose the Term had been limited to Henry and the Heirs Males of his body, so long as Thomas shall have Heirs Male of his body, that would sure have cut off the Remainder; and what is the difference? For it doth depend upon Thomas dying without Issue, whereby the Earldom should descend, then when it is limited to Henry and the Heirs Males of his body. And if Thomas die without Issue in the life of Henry, then over, this can no more abridge it, than if he had said, if Henry die without Issue during the Life of another Man.

So that I think, the whole Term is swallowed in the Estate-tail upon this consideration, and there can be no Remainder of it, no executory Devise, nor any springing Trust to Charles upon this Contingency; and, my Lord, upon that Reason, I think this Settlement fails, and is disappointed as to the younger Brothers.

The Law allows a Remainder directly upon an Estate for Life, not so on a Contingency, unless it be to happen during the continuance of the particular Estate.

If it had been limited to Henry for Life only, and no further, then let the Contingency have been what it would, that were to happen in his Life, if complicated with several Ascendents, yet it should be good in Remainder, because the Law doth allow a Remainder directly upon an Estate for Life; and so it would also in Contingency if that were to happen during the continuance of the particular Estate: But I take this to be a step further than any of our Resolutions in Law have gone yet, and therefore I cannot see reason to extend the Exposition any further; but am of opinion it fails in point of Limitation, and ought to be decreed for the Defendant. The

The Lord Chief Justice *Pemberton's* Opinion.

I Need not trouble your Lordship with opening the Case, the truth is, it is in short no more than thus: My Lord Duke of Norfolk's Father, the Earl of Arundel, having created an Estate for 200 years, and settled the Inheritance by one Dād in tail to himself for life; and after to his Lady for Life; and then to his Son, and the Heirs Males of his body; and for default of such Issue, to the other Son Charles, and the Heirs Males of his body, with several Remainders over. Then by another Dād, he does declare the Trusts of this term of 200 years, which being to Henry and the Heirs Males of his body, till my Lord Maltravers die without Issue Male, and the Earldom descend to my now Lord Duke; and after the determination of that Estate, if he shall die without Issue Male, then to come to Charles and the Heirs Males of his body, whether this be a good Remainder to Charles is the Question. For as to any thing of the Recovery or the Assignment, I shall put it quite out of the Case, and do not think it will have any Influence upon the Case as it lies before us. And indeed I do first think that the Earl of Arundel did certainly design, that if my Lord Maltravers should die without Issue Male, whereby the Honour of the Family should come to my Lord Duke that now is, Charles should have this Estate; and his intentions are manifest by creating this Term, which could be of no other use but to carry over this Estate to Charles a younger Son, upon the elder Son's dying without Issue. And I do think truly that this was but a reasonable Intention of the Father; for there being to come with the Earldom a great Estate that would so well support it, it was reason, and the younger Sons might expect it, that their Fortunes might be somewhat advanced by their Father in case it should so happen. It was a reasonable expectation in them; and truly I think it was the plain intention of the Earl. And there is no great question but it might have been made good and effectual by the limitation of two Terms; For if one Term had been limited to determine upon the death of Thomas without Issue, and that to be for the now Duke of Norfolk, and another Term then to commence and go over to Charles, that would certainly have been good, and carried the Estate to Charles upon that Contingency; but as this Case now is, I do think that this way that is now taken is not a good nor a right way; for I take this Limitation to Charles to be void in Law. And as to that, I know there is a famous difference of limiting Terms that are in Gross, and Terms that attend the Inheritance. As to Terms that are in Gross, I think it will be granted (because it hath been settled so often) they are not capable of limitation to one after the death of one without Issue; for so are all the Cases that have been cited. I think further, it is as clear, that upon Terms attendant upon an Inheritance, there may be such a Limitation, to wit, that

How this Case might have been made good.

Terms in Gross cannot be limited in Remainder. *Sectus*, Terms that attend an Inheritance.

The Diversity
as to this
Case.

a Term that waits upon an Inheritance after the death of one without Issue, may go over to another: But then it is capable of such a Limitation in that Case, with this Restriction; that is, if the Inheritance be so limited; for though it be attendant ever so much upon the Inheritance, yet that attendance cannot make it capable of another Limitation than that Inheritance is capable of: For if I have an Estate in Fee-simple, and have the Trust of a Term attendant upon that, and I will let the Estate of Inheritance descend to my Son, I cannot in this Case (though the Term be attendant) limit it, that if my Son die without Issue, that Term shall go over; it is not capable of any Foreign Limitation whatsoever; for as to that, it is a Term in Gross, it hath not the quality of a Term attendant upon the Inheritance at all; for first, it would fail of an Inheritance, and a Free-hold to support it, and further than a Term can be supported with a like Estate of Inheritance; it will fail to be a Term attendant upon the Inheritance. Now here the Estate of Inheritance is limited to Henry and the Heirs Males of his Body, with Remainders to Charles and the Heirs Males of his Body. Now thus the Term is capable of a Limitation to Henry and the Heirs Males of his Body: And for want of such Issue, to Charles and the Heirs Males of his Body; because it hath an Inheritance, on which it depends, to go along with it and support it. But to take this out of its right Course and Channel, and put another Limitation upon it: That upon the dying of Thomas without Issue, whereby the Earldom shall descend, this shall go over to Charles; alas it cannot be, because it hath no Free-hold or Inheritance to support it.

And then besides, it could not have that Reason that the Law intends for its permitting such Limitations to Terms attending the Inheritance; for I take it, the Reason why Terms are admitted to be attendant upon the Inheritance, and to be capable of Limitations to go along with the Inheritance, is the relation they have to the Inheritance; and because it is for the Benefit of the Inheritance, and that I conceive was the only Reason that at first guided these Judgments of the Court of Chancery, that these Terms should be admitted to wait upon the Inheritance to protect it; when Mortgages were made in former Times by Feoffments, upon condition of payment of Money, we hear of none of these Terms. But in the latter part of Queen Elizabeth's time, and since, the way of limiting Terms in Mortgages came up in use, and then upon the buying of Inheritances came in the Trust of these Terms; and they that purchased were advised to keep those Terms on foot, to protect their purchased Inheritance.

I must look upon this indeed as a new Case of Novel Invention; for in truth I think it is *Primæ Impressionis*, and none of the former Cases have been exactly the same: For this Term here does partake somewhat of a Term in Gross, and somewhat of a Term attendant upon an Inheritance; and if there should be such a Limitation admitted, such a Foreign Limitation as this is, (I call it Foreign, because it

it is not that which goes along with the Inheritance.) If that be allowed, we know not what Inventions may grow upon this; for I know Mens Brains are fruitful in Inventions. as we may see in Matthew Manning's Case. It was not foreseen nor thought, when that Judgment was given, what would be the Consequence when once there was an Allowance of the Limitation of a Term after the death of a Person, presently it was discerned, there was the same Reason for after twenty Mens Lives as after one; and so then it was held and agreed, that so long as the Limitation exceeded not Lives in being at the creation of the Estate, it should extend so far. That came to grow upon them then; and now if this be admitted, no Man can foresee what an ill Effect such an ill Allowance might have there, might such Limitations come in as would incumber Estates and mightily entangle Lands.

This is certain, such an allowed Limitation would add a greater Check to Estates than was ever made by Limitations of Inheritance: For when an Estate of Inheritance was limited to a Man and his Heirs Males of his Body, with Remainders over, and a Term was limited accordingly to wait upon the Inheritance: In that Case, he that had the first Estate-tail, had full power over the Term, to alienate it if he pleased; for it is not an Estate within the Statute De Donis; and I doubt not that had a great Influence upon the Judges, when they made the difference between Terms for Years in Gross, and Terms attendant upon the Inheritance. For Terms in Gross, they could not be alienated in such a Case; but Terms attending upon the Inheritance, though under such Limitations, the Parties could alien them.

But now if this Limitation in question were good, then Henry could not part with it, because it is to him and his Heirs Males of his Body, under a collateral Limitation of his Brother's dying without Issue, and the Earldom descending to himself, and then his Estate was to determine, and so it would fetter that which if it had been a Term attendant, &c. would have been alienable.

I have seen the time often when they have refused to carry Cases further than the Precedents have been in former times; and peradventure it would be dangerous if we should do so here; and it seems to me to be an odd kind of Estate, as this Limitation makes it; and if such a Construction, as the Plaintiff would have, should be made, it would bring it under a great uncertainty. To take this Estate as it stands in Henry and the Heirs Males of his Body, it is by this Limitation made, and so indeed I think it is, a Term that waits upon the Inheritance: But if this that is contended for be admitted to be a good Limitation upon the Contingency of Thomas's dying without Issue Male, then the Estate in Charles would be a Term in gross, for it hath no Inheritance to attend upon. Then suppose Henry had died without Issue Male in Charles's Life time, then it is a Term attendant upon the Inheritance again. If Charles die in the Life of Henry, it goeth to the Executors. If Henry in the Life of Charles, it goes to the Heirs.

D

There-

Therefore I think that this Estate being limited in another way, and being it would endure a strain further than any yet has been attempted, and it being to commence upon Thomas's dying without Issue Male, and not attendant upon any Inheritance, it is such an Estate as the Law cannot allow of, but void in Limitation and Creation; and so I take it the Plaintiff's Bill ought to be dismissed.

T H E

Lord Chancellor NOTTINGHAM's

ARGUMENTS.

The First Argument.

This is the Case. The Plaintiff, by his Bill, demands the Benefit of a Term for Two hundred Years, in the Barony of Grostock, upon these Settlements.

Henry Frederick, late Earl of Arundel and Surrey, Father of the Plaintiff and Defendant, had Issue, Thomas, Henry, Charles, Edward, Francis and Bernard; and a Daughter, the Lady Katharine: Thomas Lord Maltravers, his eldest Son, was Non compos Mentis, and care is taken to settle the Estate and Family, as well as the present Circumstances will admit. And thereupon there are two Indentures drawn, and they are both of the same Date. The one is an Indenture between the Earl of Arundel of the one part; and the Duke of Richmond, the Marquess of Dorchester, Edward Lord Howard of Eastcricke, and Sir Thomas Hatton of the other part: It bears Date the Twenty first Day of March, 1647. Whereby an Estate is conveyed to them and their Heirs; To these Uses: To the use of the Earl for his Life.

After that to the Countess his Wife for her Life, with power to make a Lease for 21 Years, reserving the ancient Rents.

The Remainder for 200 Years to those Trustees, and that upon such Trusts, as by another Indenture, intended to bear date the same Day, the Earl should limit and declare; and then the Remainder of the Lands are to the use of Henry, and the Heirs Males of his Body begotten, with like Remainders in Tail to Charles, Edward, and the other Brothers successively.

Then

Then comes the other Indenture, which was to declare the Trust of the Term for 200 Years, for which all these Preparations are made, and that declares that it was intended this Term should attend the Inheritance, and that the Profits of the said Barony, &c. should be received by the said Henry Howard, and the Heirs Males of his Body, so long as Thomas had any Issue Male of his Body should live, (which was consequently only during his own Life, because he was never likely to marry) and if he die without Issue in the Life-time of Henry, not leaving a Wife privement Enseint of a Son, or if after his Death, the Dignity of Earl of Arundel should descend upon Henry; Then Henry or his Issue should have no farther Benefit or Profit of the Term of 200 Years. Who then shall? But the Benefit shall redound to the younger Brothers in manner following. How is that? To Charles and the Heirs Males of his Body, with the like Remainders in Tail to the rest. Thus is the matter settled by these Indentures; how this Family was to be provided for, and the whole Estate govern'd for the time to come.

These Indentures are both sealed and delivered in the presence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them my Lord Keeper Bridgman's Clerks; I knew them to be so.

This Attestation of these Deeds is a Demonstration to me they were drawn by Sir Orlando Bridgman.

After this the Contingency does happen: For Thomas Duke of Norfolk dies without Issue, and the Earldom of Arundel as well as the Dukedom of Norfolk descended to Henry now Duke of Norfolk, by Thomas his death without Issue: Presently upon this the Marquess of Dorchester, the surviving Trustee of this Estate, assigns his Estate to Marriot; but he doth it upon the same Trusts that he had it himself: Mr. Marriot assigns his Interest frankly to my Lord Henry, the now Duke, and so has done what he can to merge and extinguish the Term by the assigning it to him, who has the Inheritance.

To excuse the Marquess of Dorchester from co-operating in this matter, it is said, there was an absolute necessity so to do; Because the Tenants in the North would not be brought to renew their Estates, while so aged a Person did continue in the Seignior, for fear, if he should die quickly, they should be compelled to pay a new Fine. But nothing in the World can excuse Marriot from being guilty of a most wilful and palpable Breach of Trust, if Charles have any Right to this Term: So that the whole Contention in the Case is, to make the Estate limited to Charles void; void in the Original Creation; if not so, void by the common Recovery suffered by the now Duke, and the Assignment of Marriot. If the Estate be originally void, which is limited to Charles, there is no harm done; but if it only be avoided by the Assignment of Marriot, with the concurrence of the Duke of Norfolk, he having notice of the Trusts, then most certainly they must make it good to Charles in Equity, for a palpable Breach of Trust, of which they had notice.

The main
Point.

So that the Question is reduced to this main single Point, Whether all this Care that was taken to settle this Estate and Family, be void and insignificant; and all this Provision made for Charles and the younger Children to have no Effect?

I am in a very great strait in this Case: I am assisted by as good Advice, as I know how to repose my self upon, and I have the fairest Opportunity, if I concur with them, and so should mistake, to excuse my self, that I did errare cum patribus; but I dare not at any time deliver any Opinion in this place, without I concur with my self and my Conscience too.

I desire to be heard in this Case with great Benignity, and with great Excuse for what I say, for I take this Question to be of so universal a concernment to all Mens Rights and Properties, in point of disposing of their Estates, as to most Conveyances, made and settled in the late times and yet on foot, that being afraid I might shake more Settlements than I am willing to do, I am not disposed to keep so closely and strictly to the Rules of Law as the Judges of the Common-Law do, as not to look to the Reasons and Consequences that may follow upon the Determination of this Case.

I cannot say in this Case, that this Limitation is void, and because this is a point, that in Courts of Equity (which are not favoured by the Judgments of the Courts of Law) is seldom debated with any great Industry at the Bar; but where they are possessed once of the Cause, they press for a Decree, according to the usual and known Rules of Law; and think we are not to examine things. And because it is probable this Cause, be it adjudged one way or other, may come into the Parliament, I will take a little pains to open the Case, the Consequences that depend upon it, and the Reasons that lie upon me, as thus perswaded, to suspend my Opinion.

Things to be
granted in
this Case.

Whether this Limitation to Charles be void or no, is the Question. Now, first, these things are plain and clear, and by taking notice of what is plain and clear, we shall come to see what is doubtful.

1. That the Term in question, tho' it were attendant upon the Inheritance, at first, yet upon the happening of the Contingency, it is become a Term in gross to Charles.

2. That the Trust of a Term in gross can be limited no otherwise in Equity, than the Estate of a Term in gross can be limited in Law: For I am not setting up a Rule of Property in Chancery, other than that which is the Rule of Property at Law.

3. It is clear, That the legal Estate of a Term for Years, whether it be a long or a short Term, cannot be limited to any Man in Tail, with the Remainder over to another after his Death without Issue; That is flat and plain, for that is a direct Perpetuity.

4. If a Term be limited to a Man and his Issue, and if that Issue die without Issue, the Remainder over, the Issue of that Issue takes no Estate; and yet because the Remainder over cannot take place,

till the Issue of that Issue fail, that Remainder is void too, which was Reeve's Case; and the reason is, because that looks towards a perpetuity.

5. If a Term be limited to a man for life, and after to his first, second, third, &c. and other Sons in Tail successively, and for default of such Issue the Remainder over, tho' the contingency never happen, yet that Remainder is void, tho' there were never a Son then born to him; for that looks like a perpetuity, and this was Sir William Backhurst his Case in the 16. of this King.

Modern Reports, 115.

6. Yet one step further than this, and that is Burgils's Case. A Term is limited to one for life, with contingent Remainders to his Sons in Tail, with Remainder over to his Daughter, tho' he had no Son; yet because it is foreign and distant to expect a Remainder after the Death of a Son to be born without Issue, that having a prospect of a perpetuity, also was adjudged to be void.

Modern Reports, 115.

These things having been settled, and by these Rules has this Court always governed it self: But one step more there is in this Case.

7. If a Term be devised, or the Trust of a Term limited to one for Life, with twenty Remainders for Life, successively, and all the persons in esse, and alive at the time of the Limitation of their Estates, these tho' they look like a possibility upon a possibility, are all good, because they produce no inconvenience, they wear out in a little time with an easie interpretation, and so was Alford's Case. I will yet go farther.

8. In the Case cited by Mr. Holt, Cotton and Heath's Case, a Term is devised to one for 18 Years, after to C. his eldest Son for Life, and then to the eldest Issue Male of C. for Life, tho' C. had not any Issue Male at the time of the Devise, or death of the Devisor, but before the death of C. it was resolved by Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, to whom it was referred by the Lord Keeper Coventry, that it only being a contingency upon a Life that would speedily be worn out, it was very good; for that there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in it self; but the contrary Rule given as a Reason by my Lord Popham in the Rector of Chedington's Case, looks like a Reason of Art; but, in truth, has no kind of Reason in it, and I have known that Rule often denied in Westminster Hall. In truth, every Executory Devise is so, and you will find that Rule not to be allowed in Blanford and Blanford's Case, 13 Jac. 1. part of my Lord Rolls, 318. where he says, if that Rule take place, it will shake several common Assurances: And he cites Paramour's and Yardley's Case in the Commentaries where it was adjudged a good Devise, though it were a possibility upon a possibility.

Roll. abr. tit. devise, 612.

A Possibility upon a Possibility, and Contingency upon a Contingency, may be. Co. 1. 156.

These Conclusions, which I have thus laid down, are but Preliminaries to the main Debate. It is now fit we should come to speak to the main Question of the Case, as it stands upon its own Reason, distinguished from the Reasons of these Preliminaries; and so the Case is this.

The direct
Question.

Co. 10. 87.

The Trust of a Term for Two hundred years is limited to Henry in Tail, provided if Thomas die without Issue in the life of Henry, so that the Earldom shall descend upon Henry, then to go to Charles in Tail; and whether this be a good Limitation to Charles in Tail, is the Question; for most certainly it is a void Limitation to Edward in Tail, and a void Limitation to the other Brothers in Tail: But whether it be good to Charles is the doubt, who is the first taker of this Term in gross; for so it is (I take it) now become, and I do, under favour, differ from my Lord Chief Justice in that point; for, if Charles die, it will not return to Henry; for that is my Lord Coke's error in Leonard Loveis's Case: for he says, That if a Term be devised to one and the Heirs Males of his body, it shall go to him or his Executors, no longer than he has Heirs Males of his body; but it was resolved otherwise in Leventhorp's and Ashby's Case, 11. Car. B. R. Rolls's Judgment, Title Devise, fol. 611. for these Words are not the Limitation of the time, but an absolute disposition of the Term.

But now let us, I say, consider whether this Limitation be good to Charles or no. It hath been said,

Object. 1. It is not good by any means; for it is a possibility upon a possibility.

Ans. That is a weak Reason, and there is nothing of Argument in it, for there never was yet any Devise of a Term with Remainder over, but did amount to a possibility upon a possibility, and executory Remainders will make it so.

Co. 6. Rep. 40

Obj. 2. Another thing was said, it is void, because it doth not determine the whole Estate, and so they compare it to Sir Anthony Mildmay's Case, where it is laid down as a Rule, that every Limitation or Condition ought to defeat the entire Estate, and not to defeat part and leave part not defeated; and it cannot make an Estate to cease as to one person, and not as to the other. But,

Ans. I do not think, that any Case or Rule was ever worse applied than that to this; for if you do observe this Case, here is no Proviso at all annexed to the legal Estate of the Term, but to the equitable Estate, that is built upon the legal Estate, unto the Estate to Henry, and the Heirs Males of his body, to attend the inheritance with a Proviso if Thomas die without issue in Henry's life, and the Earldom come to Henry, then to Charles: which doth determine the Estate to Henry, and his issue; but the other Estate given to Charles doth arise upon this Proviso, which makes it an absurdity to say, that the same Proviso, upon which the Estate ariseth, should determine that Estate too.

Obj.

Obj. 3. The great matter objected is, it is against all the Rules of Law, and tends to a perpetuity.

Ans. If it tends to a perpetuity, there needs no more to be said, for the Law has so long laboured against perpetuities, that it is an undeniable Reason against any settlement, if it can be found to tend to a perpetuity.

Therefore let us examine whether it do so, and let us see what a Perpetuity is, and whether any Rule of Law is broken in this Case.

A Perpetuity is the settlement of an Estate or an Interest in Tail, with such Remainders Expectant upon it, as are in no sort in the power of the Tenant in Tail in possession, to dock by any Recovery or Assignment, but such Remainders must continue as perpetual clogs upon the Estate: such do fight against God, for they pretend to such a stability in human Affairs, as the nature of them admits not of, and they are against the Reason and the Policy of the Law, and therefore not to be endured.

A Perpetuity, what.

Why not to be endured.

But on the other side, future interests, springing Trusts, or Trusts Executory, Remainders that are to emerge and arise upon Contingencies, are quite out of the Rules and Reasons of Perpetuities, nay, out of the reason upon which the Policy of the Law is founded in those Cases, especially, if they be not of remote or long consideration; but such as by a natural and easie interpretation will speedily wear out, and so things come to their right Chanel again.

Remainders that arise upon Contingencies out of the Rules of Perpetuities.

Let us examine this Rule with respect to Freehold-Estates, and see whether there it will amount to the same Issue.

There is not in the Law a clearer Rule than this, that there can be no Remainders limited after a Fee-simple, so is the express Book-Case, 29 Hen. 8. 33. in my Lord Dyer; but yet the nature of things, and the necessity of commerce between Man and Man, have found a way to pass by that Rule, and that is thus; either by way of Use, or by way of Devise: Therefore if a Devise be to a Man and his Heirs, and if he die without Issue in the life of B. then to B. and his Heirs: this is a Fee-simple upon a Fee-simple, and yet it has been held to be Good.

No Remainder can be limited after a Fee-simple yet by way of Use, or by way of Devise it hath been done.

My Lord Chief Baron did seem to think, that this Resolution did take its Original from Pell's and Brown's Case; but it did not so, the Law was settled before; you may find it expressly resolved 19 Eliz. in a Case between Hynde and Lyon, 3. Leonard. Which, of the Books that have lately come out, is one of the best; and it was there adjudged to be so good a limitation, that the Heir who pleaded riens peer descent was forced to pay the Debt, and it had the concurrence of a judgment in 38 Eliz. grounded upon the Reason of Wellock and Hammond's Case, cited in Beraston's Case, where it is said, Crook, Eliz. 204. in a devise it may well be, that an Estate in Fee shall cease in one, and be transferred to another: all this was before Pell's and Brown's Case, which was in 18 Jac. It is true, it was made a Question afterwards in the Serjeants Case; but

Cro. Mich. 18 Jac. 590.

3 Leonard. 64.

No Remainder can be limited after a Fee-simple, yet a Contingent Fee-simple may rise out of the first Fee.

Reasons that support the springing Trust of a Term, as well as the springing use of an Inheritance

Leases settled on Marriage.

but what then? We all know that to be no Rule to judge by; for what is used to exercise the Wits of the Serjeants, is not a governing Opinion to decide the Law. It was also adjudged in Hil. 1649. when my Lord Rolls was Chief Justice, and again in Mich. 1650. and after that indeed in 1651. it was resolved otherwise in Jay and Jay's Case, but it has been often agreed that where it is within the compass of one Life, that the Contingency is to happen, there is no danger of a perpetuity. And I oppose it to that Rule which was taken by one of the Lords the Judges, that where no Remainders can be limited, no contingent Remainders can be limited, which I utterly deny, for there can be no Remainder limited after a Fee-simple, yet there may a contingent Fee-simple arise out of the first Fee, as hath been shewn.

Thus it is agreed to be by all sides in the Case of an Inheritance; but now say they, a Lease for Years, which is a Chattel, will not bear a contingent Limitation in regard of the poverty and meanness of a Chattel-Estate. Now as to this point, the difference between a Chattel and an Inheritance is a difference only in Words, but not in substance, nor in Reason, or the Nature of the thing; for the owner of a Lease has as absolute a power over his Lease, as he that hath an Inheritance has over that. And therefore where no perpetuity is introduced, nor any inconveniency doth appear, there no Rule of Law is broken.

The Reasons that do support the springing Trust of a Term as well as the springing use of an Inheritance, are these.

1. Because it hath hapned sometimes, and doth frequently, that Men have no Estates at all, but what consist in Leases for Years? Now it were not only very severe, but (under favour) very absurd, to say that he who has no other Estate but what consists in Leases for Years, shall be incapable to provide for the Contingencies of his own Family, tho' these are directly within his view and immediate prospect. And yet if that be the Rule, so it must be; for I will put the Case; A Man that hath no other Estate but Leases for Years, Chattels real, treats for the Marriage of his Son and thereupon it comes to this agreement: These Leases shall be settled as a Joynture for the Wife, and provision for the Children: says he, I am content, but how shall it be done? Why thus; You shall assign all these Terms to John a Styles, in Trust for your self and your Executors, if the marriage take no effect; But then, if it takes effect, to your Son while he lives, to his Wife after while she lives, with Remainders over. I would have any one tell me whether this were a void limitation upon a Marriage-settlement; or if it be, what a strange absurdity is it, that a Man shall settle it if the Marriage take no effect, and shall not settle it if the Marriage happen.

2. Suppose the Estate had been limited to Henry Howard and the Heirs Males of his body, till the death of Thomas without Issue, then to Charles, there it had been a void limitation to Charles: if then the addition of those words, If Thomas dye without Issue in the life of Henry, &c. have not mended the matter, then all that addition

of Words goes for nothing, which it is unreasonable and absurd to think it should.

3. Another thing there is, which I take to be unanswerable, and gather it from what fell from my Lord Chief Justice Pemberton; and when I can answer that case, I shall be able to answer my self very much for that which I am doing. Suppose the Proviso had been thus penned, And if Thomas die without Issue Male, living Henry, so that the Earldom of Arundel descend upon Henry, then the Term of 200 Years limited to him and his Issue, shall utterly cease and determine, but then a new Term of 200 Years shall arise and be limited to the same Trustees, for the Benefit of Charles in Tail. This he thinks might have been well enough, and attained the End and Intention of the Family, because then this would not be a Remainder in Tail upon a Tail, but a new Term created.

Pray let us so resolve Cases here, that they may stand with the Reason of Mankind, when they are debated abroad. Shall that be Reason here that is not Reason in any part of the World besides? I would fain know the difference, why I may not raise a new springing Trust upon the same Term, as well as a new springing Term upon the same Trust; that is such a chicanery of Law as will be laugh't at all over the Christian World.

True Reason
the same all
over the
World.

Chicaneries
of Law, ridi-
culous.

4. Another Reason I go on is this; That the Reason of the Consideration of a Term for Years, and of a Chattel-Interest, is not to be regarded: For whereas this will be no Reason any where else; so I shall shew you, that this Reason, as to the Remainder of a Chattel-Interest, is a Reason that has been exploded out of Westminster-Hall. There was a time indeed that this Reason did so far prevail, that all the Judges in the time of my Lord Chancellor Rich, did 6 Edwardi 6. deliver their Opinions, That if a Term for Years be devised to one, provided that if the Devisee die, living J. S. then to go to J. S. that Remainder to J. S. is absolutely void, because such a Chattel-Interest of a Term for Years is less than a Term for Life, and the Law will endure no Limitation over. Now this being a Reason against Sense and Nature, the World was not long govern'd by it, but in 10 Eliz. in Dyer, they began to hold the Remainder was good by Devise; and so 15 Eliz. seems too, and 19 Eliz. it was by the Judges held to be good Remainder; and that was the first time that an executory Remainder of a Term was held to be good. When the Chancery did begin to see that the Judges of the Law did govern themselves by the Reason of the Thing, this Court followed their Opinion, the better to fix them in it, they allowed of Bills by the remainder-Man, to compel the Devisee of the particular Estate, to put in Security that he in Remainder should enjoy it according to the Limitation. And for a great while so the Practice stood, as they thought it might well, because of the Resolution of the Judges, as we have shewn; but after this was seen to multiply the Chancery Suits, then they began to resolve that there was no need of

Remainder of
a Chattel-In-
terest, how it
grew up and
increas'd in
time.

Dyer, fol. 74.

Dyer, f. 277.

Dyer, f. 328.

Dyer, f. 358.

that way, but the executoy Remainder Man should enjoy it, and the Devisee of the particular Estate should have no power to bar it. Men began to presume upon the Judges then, and thought if it were good as to remainders after Estates for Lives, it would be good also as to remainders upon Estates-Tail: That the Judges would not endure, and that is so fixed a resolution, that no Court of Law or Equity ever attempted to break in the World. Now then come we to this Case, and if so be where it does not tend to a Perpetuity, a Chattel-Interest will bear a remainder over, upon the same reason it will bear a remainder over upon a Contingency, where that Contingency doth wear out within the compass of a Life, otherwise, it is only to say, it shall not, because it shall not: For there is no more Inconveniencies in the one than in the other.

Come we then, at last, to that which seems most to choak the Plaintiff's Title to this Term, and that is the Resolution in Child and Bayly's Case: For it is upon that Judgment, it seems, all Conveyances must stand or be shaken, and our Decrees made. Now therefore I will take the liberty to see what that Case is, and how the Opinion of it ought to prevail in our Case.

1. If Child and Bayly's Case be no more than as it is reported by Rolls, part 2d. fol 119. then it is nothing to the purpose: A Devise of a Term to Dorothy for Life, the Remainder to William, and if he dies without Issue, to Thomas, without saying, in the Life of Thomas; and so it is within the common Rule of a Limitation of a Term in Tail, with Remainder over, which cannot be good.

But if it be as Justice Jones has reported it, fol. 15. then it is as far as it can go, an Authority: For it is there said to be, living Thomas. But the Case, under favour, is not altogether as Mr. Justice Jones hath reported it neither; for I have seen a Copy of the Record upon this account; and, by the way, no Book of Law is so ill corrected, or so ill printed as that.

The true Case is, as it is reported by Mr. Justice Crook; and with Mr. Justice Crook's Report of it, both my Lord Rolls agree, in his Abridgment, Title Devise, 612. There it is, a Term of 76 Years is devised to Dorothy for Life, then to William and his Assigns all the rest of the Term, provided if William die without Issue then living, then to Thomas; and this is in effect our present Case; I agree it. But what which I have to say to this Case is,

First, It must be observed, that the Resolution there, did go upon several Reasons, which are not to be found in this Case.

1. One Reason was touched upon by my Lord Chief Baron, That William having the Term to him and his Assigns, there could be no Remainder over to Thomas, of which Words there is no notice taken by Mr. Justice Jones.

2. Dorothy the Devisee for Life, was Executrix, and did assent and grant the Lease to William, both which Reasons my Lord Rolls doth lay hold upon, as material, to govern the Case.

3. William might have assigned his Interest, and then no Remainder could take place, for the Term was gone.

4. He might have had Issue, and that Issue might have assigned, and then it had put all out of doubt.

5. But the main Reason of all, which makes me oppose it, ariseth out of the Record, and is not taken notice of in either of the reports of Rolls, or Jones, or in Rolls's Abridgment. The Record of that Case goes farther, for the Record says; There was a farther Limitation upon the Death of Thomas without Issue to go to the Daughter, which was a plain affectation of a Perpetuity to multiply Contingencies. It farther appears by the Record, that the Father's Will was made the 10 of Eliz. Dorothy, the Devisee for Life, held it to the 24, and then she granted and assigned the Term to William; he under that Grant held it till the 31 of Eliz. and then re-granted it to his Mother, and died; the Mother held it till the 1 of R. James, and then she died; the Assignees of the Mother held it till 14. Jac. and then, and not till then, did Thomas, the younger Son, set up a Title to that Estate; and before that time it appears by the Record, there had been six several Alienations of the Term to Purchasers, for a valuable Consideration, and the Term renewed for a valuable Fine paid to the Lord. And do we wonder now, that after so long an Acquiescence as from 10 Eliz. to 14 Jac. and after such successive Assignments and Translations, that the Judges began to lie hard upon Thomas, as to his Interest in Law, in the Term, especially when the reasons given in the reports of the Case, were legal Juducements to guide their Judgments, of which there are none in our Case? But then,

Secondly, At last, allowing this Case to be as full and direct an Authority as is possible, and as they would wish, that rely upon it; then I say--

1. The Resolution in Child and Bayly's Case, is a resolution that never had any resolution like it before nor since.

2. It is a resolution contradicted by some resolutions; and to shew, that that resolution has been contradicted, there is---

1. The Case of Cotton and Heath, which looks very like a contrary resolution; there is a term limited to A. for eighteen Years, the remainder to B. for Life, the remainder to the first Issue of B. for Life, this contingent upon a Contingent was allowed to be good, because it would wear out in a short time. But

Rel Abr. Tit. Devise, 612

2. To come up more fully and closely to it, and shew you, that I am bound up by the resolutions of this Court, there was a fuller and flatter Case 21 Car. 2. in July 1669, between Wood and Saunders. The Trust of a long Lease is limited and declared thus: to the Father for sixty Years if he lived so long; then to the Mother for sixty Years, if she lived so long; then to John and his Executors if he survived his Father and Mother; and if he died in their Life-time, having issue, then to his issue; but if he die without issue, living the Father or Mother, then the remainder to Edward in tail.

Cases in Chancery 1 Part. 131

John

John did die without Issue, in the Life-time of the Father and Mother, and the Question was, Whether Edward should take this Remainder after their Death? and it was resolved by my Lord Keeper Bridgeman, being assisted by Judge Twisden and Judge Rainsford, that the Remainder to Edward was good, for the whole Term had vested in John, if he had survived; Yet the Contingency never hapning, and so wearing out in the Compass of two Lives in being, the Remainder over to Edward might well be limited upon it.

Thus we see, that the same Opinion which Sir Orlando Bridge-man held when he was a Practiser, and drew these Conveyances, upon which the Question now ariseth, remained with him when he was the Judge in this Court, and kept the Seals; and by the way, I think it is due to the Memory of so great a Man, whenever we speak of him, to mention him with great Reverence and Veneration for his Learning and Integrity.

Object. They will perhaps say, Where will you stop if not at Child and Bayly's Case?

Ans. Where? whyeverywhere, where there is not any Inconvenience, any Danger of a Perpetuity; and whenever you stop at the Limitation of a Fee upon a Fee, there we will stop in the Limitation of a Term of Years. No Man ever yet said, a Devise to a Man and his Heirs, and if he die without issue, living B. then to B. is a naughty Remainder, that is Pell's and Brown's Case.

Now the Ultimatum quod sit, or the utmost Limitation of a Fee upon a Fee, is not yet plainly determined, but it will be soon found out, if Men shall set their Wits on work to contrive by Contingencies, to do that which the Law has so long laboured against, the Thing will make it self Evident, where it is inconvenient, and, God forbid, but that Mischief should be obviated and prevented.

The Equitable Reasons of this Case.

I have done with the legal Reasons of the Case: It is fit for us here a little to observe the Equitable Reasons of it; and I think this Deed is good both in Law and Equity; And the Equity in this Case is much stronger, and ought to sway a Man very much to incline to the making good this Settlement if he can. For,

1. It was Prudence in the Earl to take care, that when the Honour descended upon Henry, a little better Support should be given to Charles, who was the next Man, and trod upon the heels of the inheritance.

2. Though it was always uncertain whether Thomas would die without issue, living Henry, yet it was morally certain that he would die without issue, and so the Estate and Honour come to the younger Son: For it was with a careful Circumspection always provided, that he should not marry till he should recover himself into such estate of Body and Mind, as might suit with the Honour and Dignity of the Family.

3. It is a very hard thing for a Son to tell his Father, that the Provision he has made for his younger Brothers is void in Law, but it

it is much harder for him to tell him so in Chancery. And if such a Provision be void, it had need be void with a vengeance; it had need be so clearly void, that it ought to be a Prodigy if it be not submitted to.

Now where there is a Perpetuity introduced, no Cloud hanging over the Estate but during a Life, which is a common Possibility where there is no Inconvenience in the Earth, and where the Authorities of this Court concur to make it good; to say, all is void, and to say it here, I declare it, I know not how to do it. To run so counter to the Judgment of that great Man, my Lord Keeper Bridgman, who both advised this Settlement; and when he was upon his Oath in this place decreed it good. I confess his Authority is too hard for me to resist, though I am assisted by such Learned and Able Judges, and will pay as great a Deference to their Opinions as any Man in the World shall.

If then this should not be void, there is no need for the Merger by the Assignment or the Recovery to be considered in the Case: For if so be this be a void Limitation of the Trust, and they who had notice of it, will palpably break it, they are bound by the Rules of Equity to make it good by making some Reparation. Nay, which is more, if the Heir enter upon the Estate to defeat the Trust, that very Estate doth remain in Equity infected with the Trust; which was the Case of my Lord of Thomond; so also was the Resolution in Jackson and Jackson's Case: So that to me the Right appears clear, and the Remedy seems to be difficult.

Therefore my present Thoughts are, that the Trust of this Term was well limited to Charles, who ought to have the Trust of the whole Term decreed to him, and an Account of the mean Profits, for the Time by-past, and a Recompence made to him from the Duke and Marriot for the Time to come. But I do not pay so little Reverence to the Company I am in, as to run down their solemn Arguments and Opinions upon my present Sentiments; and therefore I do suspend the enrolment of any Decree in this Case, as yet: But I will give my self some time to consider, before I take any final Resolution, seeing the Lords the Judges do differ from me in their Opinions.

Lord Chancellor's Opinion.

De Termino Pasch. Anno 34 Car. II. Ro. In
Cancell. Sabbati 13 die Maii.

Howard Versus le Duc de Norfolk.

This Day was appointed for final Judgment in this Cause, and it being called,

Mr. Serjeant M. moved: My Lord, We depend upon your Lordship in that Cause for your Opinion.

Mr. S. G. My Lord, In the Case of Howard against the Duke of Norfolk, I do not know whether I may have the Liberty to move this that I am going to offer. It stands now in the Paper now for your Lordship's Judgment, and therefore I speak this that I now offer with great submission, if your Lordship will please to hear it. If you will please to allow my Lord of Arundel's Counsel the Liberty of offering any thing further in the Cause. Possibly it will not become them to offer any thing that hath been said, but if they may be permitted to argue some new Matter if they can find any. Therefore we that are for my Lord of Arundel, desire the Liberty of having some little time till Mr. Keck (who is of my Lord's Counsel, but at present indisposed, and has not yet been heard) can come, which we hope will not be long. We hope it will be no Prejudice to this Cause, which has had so long agitation, to stay a few Days longer. A Week's time sure will break no Squares.

Lord Chancellor. I did appoint the first Tuesday in the Term to deliver my opinion in this Case, for I desire to rid my hands of it. But Mr. Keck, who was then at the Bar, did pray that he might argue it once more for the Defendant, and my Lord Duke of Norfolk having never been heard by Mr. Keck, I was willing to hear him. For it was a Cause of moment and difference of Opinions, and there are so many Short-hand Writers, that nothing can pass from us here, but it is presently made publick; and tho' a Man doth not speak in Print, yet what he says shall be immediately put in Print; therefore because Mr. Keck desired it, and to justify my own Opinion, tho' I had appointed the first Tuesday in the Term, yet I gave till this Day. It is but Reason Mr. Keck should be heard, who has not yet argued it; and if any Man can convince me I am in an Error, or make it appear to me, that I am mistaken in the Law, in the Opinion I have given, which as yet I see no Cause in the World to change, God forbid, but I should hear them; but on the other side, this Cause must not everlastingly be put off, because my Lord Duke's Counsel are not here. Therefore I will give you a Week's time further; but upon this Day sevensnight, come or not come, I will give my Judgment in the Cause.

Mr. Serj. M. If your Lordship pleases to put it upon the other side, unless they shew Cause, then the Opinion your Lordship has given to stand.

Lord Chancellor. If my Opinion (which is under the Prejudice of being contrary to that of the three Chief Judges) can be refuted, I am not ashamed to retract any Error I may be convinced of, but truly at present I see no colour to retract it.

Mr. Serj. M. We pray then, my Lord, that we may have this Right done for us, who are for Mr. Howard the Plaintiff, that they on the other side will let us know what particular Points we must go upon; for if they come at large, we may not perhaps be so well provided to answer them.

Lord Chancellor. I suppose they can say nothing to any Point, but that which is the main Point in the Case, the Limitation of the Remainder of a springing Trust after the Entail of a Term, that is to determine upon a Contingency that expired in the time of a Life; a Point which was never argued for Mr. Howard at the Bar, nor stirred by the Counsel.

Mr. Serj. M. I hope we for Mr. Howard shall be heard to justify your Lordship's Opinion.

Lord Chancellor. What hath been said here at the Bench on both sides, has been taken in Short-hand, and made publick, I know the Counsell on both sides hath seen it, or will see and look into it well, and if they can give me any reasonable Satisfaction that I am in the Wrong, I shall easily recede from it. But upon any thing yet offered I am of the same mind I was. As to the Learned Judges that assisted me at the Hearing, the Decree is mine, and the Oath that Decree is made upon is mine, theirs is but Learned Advice and Opinion. And therefore if they can satisfy my Conscience, that they are in the Right and I not, well and good; if not, I must abide by that Decree I have made, according to my Conscience. And I will repeat this to you, I go upon these Heads for my own Opinion, and I would be glad any body would answer them. I say, it is against natural Justice, to say that a Man who hath no Estate but what consists in Terms, shall be disabled from settling his Estate, so as to provide for the Contingencies in his Family, that are in immediate Prospect. I say it is a common Case. A Man that is Lessee for Years, assigns his Term in Trust for himself, until such a marriage take effect, and after to himself for life, to his Wife for life, with Remainder in Tail to his Children. Is that springing Trust upon the Contingency of the marriage good or not? If it be not good, then what will become of a great many marriage-settlements: If it be good, then why not in this Case as well as that? And I would fain know what difference there is between the Case as it is at the Bar, and if it had been limited thus; If my Lord Arundel had said, that if Thomas die without Issue, living Henry, then the Term for Two hundred Years in Tail should cease, and a new Term should arise upon the same Trust for Charles, that it seems had been well enough; is there

A Repetition
of the Rea-
sons.

there any Sense in the World that can lead a reasonable Man to conclude why there should not be a new springing Term upon the same Truss. I cannot see any Reason to run this Case down upon the single Authority of Child and Baily's Case, which was such a Resolution, as never had its like before, nor since, but contradicted by several Resolutions as have been cited, particularly, Wood and Saunders's Case in this Court in my Lord Bridgman's time. These are the Grounds my present Apprehensions go upon; but I will hear Mr. Keck, if it may be in any reasonable Time, and give the Respect to the Duke of Norfolk, that he shall not be surprized, though withal, I must do Mr. Howard the Justice that he be not eternally delay'd.

Then the Day sevensnight was appointed; but upon the Continuance of Mr. Keck's Illness, it was put peremptorily for Judgment on the first Saturday in the next Term.

De Term. Trin. Anno Reg. Car. II. 34. in Cancel.
Howard vers. le Duc de Norfolk.

Sabbati 17 Junii, Anno Dom. 1682.

Mr. Serj. M. **M**^y Lord, We have nothing to do in that Cause, but to pray your Judgment.

Mr. S. G. **M**^y Lord, we were in great hopes to have had other Assistances to Day, but it seems we are disappointed of them: That which I shall humbly offer is but short. We are, by your Lordship's Favour, permitted now to offer something if we can, to answer the Objections which your Lordship made, and which were the Ground of your Opinion. We did apprehend them to be these; That Child and Baily's Case was not the same with this Case, and that the Case of Wood and Saunders is the last Resolution of this nature, and will rule this. We do, my Lord, humbly with submission offer these Reasons, why the first Case is the same with this, and the other different from it. Child and Baily's Case, my Lord, tho' it doth differ in some Circumstances, yet it differs in no one that doth immediately concern the limitation. For the Circumstances wherein they differ was the length of the Term being almost expired, the Conveyances over to several Purchasers, and at the end of the Term the Resolution taken. But tho' it differs in these Circumstances, yet these have no influence upon the limitation or the construction of Law upon the limitation. Now the limitation is the same there as it is here, for there it is to one for Life, and to his Son during the whole Term; and if he die without Issue, during the Life of his

his Father and Mother, then the remainder over this remainder was adjudged void. This is the same Case with ours, for in the Case the first remainder actually vested in William the Son, for it was to him and his Assigns during the whole Term, and if he die without Issue, living Father and Mother, then over. This remainder I say was adjudged void, he was actually seized of the whole Interest, which being vested in him, could not be divested upon the contingent Limitations over, upon his death without Issue, living Father and Mother. It is the same in our Case, the Duke of Norfolk has the Interest of this Estate by the Limitation in Tail actually vested in him, and then it cannot be divested by the Rule of Child and Baily's Case upon the Contingency of Thomas's dying without Issue in the Life of Henry; which is during the Life of the now Duke of Norfolk. And in this respect the Case of Wood and Saunders is not the same. It is a Limitation to the Father and Mother for Life, and for 60 years, if they so long live, then to John the Son, if living at the time of the death of Father and Mother, the whole Term. My Lord, this was not a vesting the Estate in John the Son, but a contingent Limitation, that he should take or not. If he were living at the time of the Death of Father and Mother, then he should take; if not, he should not take. There was no Interest vested in him till the Contingency happened, and so the Limitations will be different. And that is the Ground that is drawn up in the Decretal Order of the Cause, because this was a contingent Limitation to John, and that never happening, it is all one, as if it had never been limited, and amounts, putting the contingent Limitation, which never happened, out of the Case, to no more than a Limitation to the Father and Mother for Life, the remainder over, which is well enough. This is that I have to offer, and I humbly submit it to your Lordship.

Mr. Serj. M. And so we do, and pray your judgment.

Mr. R. I see they are pressing for your Lordship's judgment, and I know not whether it will become me to interpose with any thing.

Lord Chancellor, Say, say, for this is a Cause that deserves patience.

Mr. R. No man, my Lord, can have any great Encouragement to add any thing after all the Arguments that have been made in this Cause, or can hope to offer that which will be very material and new, but I desire to have leave to say this in short. My Lord, there be two Deeds by which this Settlement is made, as a provision for the second Son of this Family, and the younger Children, and therein it doth perhaps appear, that if the Bulk of the Estate and the Honour should come to the second Son, then the Settlement of this part that is made upon the second Son, was intended to come to the now Plaintiff, and the younger Children. This is the intention of the two Deeds. By the first Deed the Estate of Freehold and Inheritance is limited in Tail. By the second Deed the trust is declared of the term for 200 Years that is limited

mitted to Henry, and so over. And therein it differs from the Case of Wood and Saunders; for the trust of the term doth vest in Henry, till the Contingency happen; but in Wood and Saunders's Case, there it is limited to the Father and Mother for 60 Years, if they lived so long, then to John and his Heirs Males, in case he survive his Father and Mother, and the Trust to be assigned to him accordingly, and if he die without Issue in the Life of the Father and Mother, then to Edward his Brother. No man can say that ever any thing here did vest in John, for it was but limited to him after his Father and Mother's life, in case he survived them, but it never vested in him, and so it differs from this Case. For here the Trust of the Term did vest in the Duke of Norfolk till the Contingency did happen. And as that is the difference between the two Cases, and I do apprehend it is a difference with great reason from Wood and Saunders's Case, so that which I infer from it is this, that where the trust of a Term is limited to a man and his issue, and his Heirs Males, and that vested in him, if he die without Issue, or which is much a stronger Case, tho' the Contingency be restrained within the compass of a life, or of a certain time that is to wear out in a reasonable distance, yet coming after a Limitation in Tail cannot carry the remainder over. For if you once admit it during one life, you must admit it during twenty lives, for the reason is the same as to twenty, as it is to one, if they be all in being, and perhaps the reason will be the same as to twenty lives all in being, and for the life of one Person more. Then if the trust of a term where it is once vested in Tail, can never be well limited over, tho' restrained within the contingent distance of a reasonable time; this Limitation to the Plaintiff can never be good. My Lord, I crave leave to offer your Lordship one Case or two; suppose that a term for Years, or the Limitation of the trust of a Term for Years (for I think there is the same construction made of both) be limited to J. S. and the Issue of his Body, and if J. S. die without Issue within 100 Years (for the purpose) or within twenty Years, then to go over to J. N. that cannot be apprehended to be good, but void; for there is no difference between 1000 or 100 or 20 Years, yet 20 Years is but a reasonable time, and not more in prospect than one or ten lives. If a man limit the trust of a term, or a term it self to J. S. and the Issue of his Body; and if he die without Issue before 21, then to go over to J. N. This is a reasonable distance of time, and yet I believe this will not be allowed to be good and well limited over. And the reason is, where once a Term is limited to a man and his issue, this in a reasonable construction of Law carries the whole Term (for it was a good while before they gained the point of remainders after lives) and (if after it be said,) if he die without Issue within 100 Years, or before 21, that restriction will not help it as we think. Then where is the reason or Sense that it should be otherwise, if he die without Issue in the

life of another Person? Truly, my Lord, it is very hard to find out a true difference between the Cases where the Restriction is for the life of a certain Person, and where it is upon a certain number of Years. My Lord, I would put this Case upon Wood and Saunders's Case, which is the Authority that is so much pressed upon us. Suppose that Case had been this; to the Father for 60 Years, if he so long live; to the Mother for 60 Years, if she so long live, and then instead of that Limitation to John, in case he survived his Father and Mother: Suppose it had been to the first Son of the Father and Mother, and the Heirs of his Body, and if such first Son die without Issue in the life-time of his Father and Mother, then it should go over to another Person. Had it then been good? Surely no. What is the difference? Why this, it being to John, in case he survived his Father and Mother, nothing vested. But if it had been to the first Son, and the Heirs of his body, and they have a Son, there it differs, for it is actually vested in him. And there the Limitation over to a Stranger would not be good, even admitting the Case of Wood and Saunders to be uncontrollable. Another Objection your Lordship made, was about the necessary Limitations of the Trusts of terms by Termers upon Marriage-Settlements to a man's self, till the marriage take effect, and then to such and such uses; and the Objection is, why should it not be as good a Limitation of the trust of a term, or of a term it self, as well as of an inheritance? That will not reach our Case, therefore I need not say any thing to it, whether it would be so or no. But suppose this Case, there be two Brothers, the eldest hath no Children, the younger Brother hath a Son, and is a going to marry the Son, but hath but a small Estate to give him. The elder Brother has a Term for Years, and has a mind to provide for the Son of his younger Brother, and his intended Wife, and he limits the Trust of his Term thus; to the use of himself, and his Executors till the marriage be had; but if he die, or provided he die before the marriage had, without Issue, living his younger Brother, the Father of him that is to be married, then to the use of that Son, and so on. We do make a great Doubt, whether the Limitation of the Trust of the Term there, would be good or not, upon the difference of Child and Baily's Case, that has been so often mentioned in this Cause, and was so solemnly resolved. The Resolution of which Case, and that also of Wood and Saunders, we submit to your Lordship's Consideration. As for the intention of the Parties in this Settlement, we cannot but say, it was intended as a Provision, that when the Bulk of the Estate, and the Honour came to the Duke, his younger Brothers should have an increase of their Portions. But it is as plain the intent does fail as to all the other younger Children, because the construction of Law will not support it. So that the intent without the Rule of Law to maintain it, will signify nothing.

Pr.

Mr. H. If your Lordship will please to give me leave, I think, I may offer something that has not yet been observed; we do not trouble your Lordship or our selves out of a presumption, that we shall so far prebail, as to alter the Opinion your Lordship has delivered; but truly my design is to offer some Reasons, why I hope your Lordship will be pleas'd to take some further Consideration of the matter. Not, but that I know your Lordship did very seriously deliberate upon it, before you delivered your Opinion, and you have been pleas'd to tell us the Reasons you went upon, and they were two. First, upon the Case of Wood and Saunders in this Court: And Secondly, upon the natural Reason and Justice, that a man that has no other Estate, but Terms for Years, should have a power to settle those Terms, so as to provide for the Contingencies of his Family. That a settlement of a term upon Trusts to himself, till the marriage take effect, and then over, shall be good; this might be resembled to Pell and Brown's Case, and so come within the same reason. Now my Lord, with submission, we have this to offer. This trust of this term in our Case, was first to attend the inheritance, and that was an Estate-Tail limited; but then there is a Contingency added to this trust, to this trust of the Term, that if Thomas die without issue, living Henry, then to Charles, and as it hath been said already, it is very plain this Entail of the Term did actually vest. Then the single first Question is, whether upon the Contingency happening, the death of Duke Thomas without issue, it shall devest, and a springing trust arise to the now Plaintiff Mr. Charles Howard. It is said there was a just care taken for him that was a younger Son; so there was: but a like care was taken for the other five, Bernard, &c. as well as for him. Now then the Case lies upon this doubt, with submission to your Lordship, whether this can enure by way of a springing Trust by a new Creation. We think that cannot be; for here being once an Estate-Tail limited in a term that was to attend an Estate-Tail of the inheritance, the Remainder over must be void in the very Creation. My Lord, I have observed, ever since I have had the Honour to practise at this Bar, and very many particular instances might be given, that when the Judges have been upon the Cases called to advise here, they would not go beyond, nor think fit that this Court should, beyond the Resolution in Manning's Case. And they have often said, if that Case were now to be adjudged, it would receive another kind of Resolution. The Judges gave that Resolution by way of Executory devise, and now I think, since that, there have been more Suits in this Court of this Nature since the King's Restauration, than were in forty Years before. For cunning People will be always finding out Perpetuities, and are fond of Limitations tending to Perpetuities, not only in Inheritance, but in Terms for Years. After Manning's Case, the Conveyancers did contrive these Trusts of Terms for Years to go beyond that Case. For they seemed to argue thus; That being good by way of Executory devise, then we will

Trusts of
Terms, when
introduced.

will declare a Trust, and that the Law has nothing to do with, it is a Creature of Equity, and governable by Equity. And I have seen a Conveyance of this nature made by my Lord of Leicester to Marriot and Western, drawn 1658. where there was the trust of a term limited over after an Estate-Tail; but that was never insisted upon to be good, all the Cases being otherwise. If then it be not good by way of Executory Devise, it cannot be good by way of Limitation of the trust of a term. Now in this Case, certainly it would not be a good Remainder by way of Executory Devise. For when a term is devised to end in tail, no man will say a Remainder of the term can be limited over. As for the Case of Wood and Saunders, that, my Lord, I conceive had been good by way of Executory Devise. A Man that hath a term, deviseth it to his Wife for Life, and if John his Son be living at the death of his Wife, then to him in tail; but if he die without issue, living the Wife, then to Edward, that might be good. For it is a Condition precedent as to John, and there he must survive his Father and Mother, or he takes nothing; but he dying before them, never vested in him at all, and so might well vest in Edward. But in our Case it is void in the Creation, because in the Case here before your Lordship it did vest, and was to attend the inheritance, when the Contingency happens: Can it then enure to the Plaintiff by way of springing Trust? Surely no. In Wood and Saunders's Case it never vested, in our Case it did vest. But I must, my Lord, crave leave to say one Word to another Point in the Case, and that is the Recovery. When contingent Remainders in Law, in Cases of Settlements, may be by any Act in Law barred, this Court, I conceive, will not set them up again. Now in this Case before the Contingency happened, when the Estate-tail of the inheritance was in my Lord Duke of Norfolk, and the Lease for Two hundred Years attendant upon that Estate-tail, then doth my Lord Duke suffer a common Recovery, which we apprehend hath so barred and destroyed this Term, that this Court will never interpose to set it up again. My Lord, That which on the Duke's Behalf we now desire is, that your Lordship will be pleased to take some further time to consider of it, and deliver your Judgment the next Term.

Mr. Serj. M. My Lord, I did not expect, I must confess, an Argument at this rate, and at this time; but your Lordship in great Celerity and Favour hath given them leave to do it: But after all, under favour, what they say is a great mistake of the Case. If they had observed what was said, and truly applied it, they would have answered themselves. What interpretation in such a Case shall be made, or not be made, is merely matter of Equity, which upon the Circumstances of every Case is governable by the Circumstances. I would not go after their Example to argue, to support, as they have done, to overturn the Opinion of the Court that has been delibered. But I would offer this to your Lordship; There is a great mistake in calling this a Remainder, it is no such thing as a Remainder:

It

It

No Remain-
der, but a
springing
Trust upon a
Contingency

It is indeed a springing Trust upon a Contingency: But pray, my Lord, consider how it stands here in Equity before your Lordship. Here is a noble and great Family, the Heir of it under the Visitation of the Hand of God, which no one could remove but God alone; here are a great and numerous Issue to provide for, that Provision is made according to the Rules of Nature and Justice; and it being necessary to be done, no man could contrive it better than this Settlement. My Lord, they frighten us with the word Perpetuity. It is true, a Perpetuity cannot be maintained, that is, an Inheritance not to be aliened or barred, or that can never end. But here is but the name of a Perpetuity, and certainly, that must be a strange and monstrous Perpetuity, that must determine within the short space of a Life. A Perpetuity is an Estate that can never be barred. And Littleton hath a Rule, that there is no Estate but can be barred, if all the Persons concerned in it join. But it is under favour a Contradiction, and a great one, to call this a Perpetuity; a monstrous one, I say it is, where any man can see the end of it; and whereas to the Circumstances of the Case, the Family could not otherwise be well provided for. And whereas Perpetuities are abhorred, it is upon the inconvenience, which hinders other Provisions in case of necessity; and it were indeed an inconvenience, that every Family should have the Misfortunes that were in this, and not be able to provide some sort of Remedy for them. Some Cases, my Lord, have been put by the other side now, which under favour are nothing to the purpose, and would need no other Answer than they give themselves. But truly I think it is not fit for the Advantage of the Publick, that after a Case has been so solemnly argued, the Council should dispute the Opinion of the Court.

My Lord, I would desire to say a word in answer to some things that have been urged. As to the Case that Mr. H--ch--s put, I think it had been good by way of Executory Devise. To one and his Heirs Males, till such an one returns from Rome, or the like, had been good, especially where the Determination depends but upon the expiring of a short Life. But all this is but *Petitio principii*, the same thing over add over. As for Child and Baily's Case, there are several things that differ it from ours. There it hath a Semblance of our Case, of one dying without Issue; but is it there upon a Life, and not within a Life as ours doth. And in our Case, my Lord, this Limitation to Henry is a Limitation of a Term attendant upon an Inheritance, and then it is plainly as if the Limitation of a Freehold Estate were to one and the Heirs of his Body, and if such an Accident happens, the Estate to cease, and be to another for 100 Years. As it is in Henry attendant upon the Inheritance; it should not if Henry had died have gone to his Executor, but to his Heir. Then, as to Charles, here is a Condition that determines the whole Trust as to Henry, and there it begins to be first a Limitation of a Term in gross. He that creates a Term attendant upon an Inheritance, may sever it if he will; and if he may sever it, may

He that cre-
ates a Term
attendant up-
on an Inheri-
tance, may
sever it if he
will.

may he not limit it upon a Contingency, that upon such a Contingency it shall be severed? All Conditions are either precedent, or subsequent. Precedent to create a springing Trust, and Subsequent to destroy the former Estate. In Wood and Saunders's Case, John did not take, but upon the precedent Condition; but Edward took it upon the subsequent Condition. In our Case this Condition is both; as to the destroying of the Trust to Henry it is a subsequent Condition; but as to the creating a new Trust to Charles, it is a precedent Condition. My Lord, I must not undertake to argue this Case, but only to say a little to what was said on the other side; we hope it being upon so short a Contingency which has now happen'd, the Limitation of this Term to the Plaintiff is good, and we pray your Judgment for him.

T H E

Lord Chancellor's

S E C O N D

ARGUMENT.

Lord Chancellor. **I** Am not sorry for the Liberty that was taken at the Bar to argue this over again, because I desired it should be so; for in truth I am not in love with my own Opinion, and I have not taken all this time to consider of it, but with very great willingness to change it, if it were possible. I have as fair and as justifiable an Opportunity to follow my own inclinations (if it be lawful for a Judge to say he has any) as I could desire; for I cannot concur with the three Chief Judges, and make a Decree that would be unexceptionable: But it is my Decree, I must be saved by my own Faith, and must not decree against my own Conscience and Reason.

It will be good for the Satisfaction of the Publick in this Case, to take notice how far the Court is agreed in this Case, and then see where they differ, and upon what Grounds they differ; and whether any thing that hath been said be a Ground for the changing this Opinion. The Court agreed thus far:

That

The Limita-
tion of the
Trust of a
Term, and
the Limita-
tion of the
Estate of a
Term all one.

That in this Case it is all one, the limitation of the Trust of a Term, or the limitation of the Estate of a Term, all depends upon one and the same Reason. The Court is likewise agreed (which I should have said first, to dispatch it out of the Case, that it may not trouble the Case at all) that the Surrender of Marriot to the Duke of Norfolk, and the common Recovery suffered by the Duke, are of no use at all in this Case. For if this limitation to Charles be good, then is that Surrender and the Recovery a Breach of Trust, and ought to be set aside in Equity; so all the Judges that assisted at the hearing of this Cause agreed: If the Limitation be not good, then there was no need at all of a Surrender to bar it, nor of the common Recovery to extinguish it.

But then we come to consider the limitation, and there it is agreed all along in Point of Law, That the measures of the limitations of the Trust of a Term, and the measures of the limitations of the Estate of a Term, are all one, and uniform here, and in other Cases, and there is no difference at Chancery or at Common Law, between the Rules of the one and the Rules of the other; what is good in one Case, is good in the other. And therefore in this Case the Court is agreed too, that the Limitations made in this Settlement to Edward, &c. are all void, for they tend directly and plainly to Perpetuities, for they are limitations of Remainders of a Term in gross after an Estate-tail in that Term, which commenceth to be a Term in gross, when the Contingency for Charles happens.

Thus far there is no difference of Opinion: But whether the limitation to Charles, if Thomas die without issue, living Henry, whereby the Honour of the Earldom of Arundel descends upon Henry; I say, whether that be void too, is the great Question of this Case wherein we differ in our Opinions.

Remainders
of Terms af-
ter Estates-
Tail in those
Terms, are
void.

It is said that is void too; and yet (sever it from the Authority of Child and Baily's Case, which I will speak to by and by) I would be glad to see some tolerable Reason given why it should be so; for I agree it is a Question in Law here upon a Trust, as it would be elsewhere upon an Estate; and so the Questions here, are both Questions of Law and Equity. It was well said, and well allowed by all the Judges, when they did allow the Remainders of Terms after Estates-tail in those Terms to be void. I shall not devise a Term to a Man in tail with Remainders over; the Judges have admirably well resolved in it, and the Law is settled, (and Matthew Manning's Case did not stretch so far) because this would tend to a Perpetuity.

Yet the bare
Limitation
of the Re-
mainder af-
ter an Estate
Tail, which
doth not
tend to Per-
petuity, is
not void.

Now on the other side, I would fain know, when there is a Case before the Court, where the limitation doth not tend to a Perpetuity, nor introduceth any visible inconvenience, what should hinder that from being good: For tho' if there be a tendency to a Perpetuity, or a visible inconvenience, that shall be void for that Reason; yet the bare limitation of the Remainder after an Estate-tail, which doth not tend to a Perpetuity, that is not void. Why? because it is not? I dare not say so; see then the Reasons why it is so. The

Reasons

Reasons that I lie under the load of, and cannot shake off, are these.

The Law doth in many Cases allow of a future contingent Estate to to limited, where it will not allow a present Remainder to be limited; and that Rule, well understood, goeth through the whole Case. How do you make that out? Thus: If a Man have an Estate limited to him, his Heirs and Assigns for ever, (which is a Fee-simple) but if he die without issue, living J. S. or in such a short time, then to J. D. tho' it be impossible to limit a Remainder of a Fee upon a Fee, yet it is not impossible to limit a contingent Fee upon a Fee. And they that speak against this Rule, do endeavour as much as they can to set aside the Resolution of Pell and Brown's Case, which (under favour) was not the first Case that was so resolved; for, as I said before, when I first delivered my Opinion, it was resolved to be a good Limitation. 10 Eliz. in the Case of Hinde and Lyon, 3 Leonard 64. which by the way is the best Book of Reports of the later ones that hath come out without Authority. If that be so, then where a present Remainder will not be allowed, a contingent one will. If a Lease for Years come to be limited in tail, the Law allows not a present Remainder to be limited thereupon, yet it will allow a future Estate arising upon a Contingency only, and that to wear out in a short time.

The Reasons.

But what time? and where are the Bounds of that Contingency? You may limit, it seems, upon a Contingency to happen in a Life: What if it be limited, if such a one die without issue within 21 Years, or 100 Years, or while Westminster-Hall stands? Where will you stop if you do not stop here? I will tell you where I will stop: I will stop where-ever any visible inconvenience doth appear; for the just Bounds of a Fee-simple upon a Fee-simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it.

First of all then, I would fain have any one answer me, where there is no Inconvenience in this Settlement, no Tendency to a Perpetuity in this Limitation, and no Rule of Law broken by the Conveyance, What should make this void? And no Man can say that it doth break any Rule of Law, unless there be a Tendency to a Perpetuity, or a palpable inconvenience. Oh, yes, Terms are meer Chattels, and are not in Consideration of Law so great as Freeholds, or Inheritances. These are Words, and but Words, there is not any real difference at all, but the Reason of Mankind will laugh at it: Shall not a Man have as much Power over his Lease as he has over his Inheritance? If he have not, he shall be disabled to provide for the Contingencies of his own Family that are within his view and prospect, because it is but a Lease for Years, and not an Inheritance of a Freehold. There is that Absurdity in it which is to me insupportable, nor is the Case that was put, answered in any degree. A Man that hath no Estate but what consists in a Lease for Years, being to marry his Son, settled this Lease thus: In Trust for himself in tail, till the Marriage take effect; and if

the Marriage take effect while he lives, then in Trust for the married Couple; is this future Limitation to the married Couple good or bad? If any Man say it is void, he overthrowes I know not how many Marriage-Settlements: If he say it is good, why is it not a future Estate in this Case as good as in that, when there is no tendency to a Perpetuity, no visible inconvenience?

All Men are agreed, (and my Lord Chief Justice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I desire no better Argument in the World to maintain my Opinion, than that; For, says my Lord Chief Justice, suppose it had not been said thus; if Thomas die without issue, living Henry, then over to Charles; but thus, if it happens that Thomas die without issue in the Life of Henry, &c. then this Term shall cease, and there shall a new Term arise and be created to vest in Charles in Tail, and that had been wonderful well, and my Lord of Arundel's Intention might have taken effect for the younger Son. This is such a Subtlety as would pose the Reason of all Mankind: For I would have any Man living open my Understanding so far, as to give me a tolerable Reason why there may not be as well a new springing Trust upon the same Term to go to Charles, upon that Contingency, as a new springing Lease upon the same Trust: For the latter doth much more tend to a Perpetuity than the former doth, I am bold to say it.

A new springing Trust upon the same Term, as reasonable as a new springing Lease upon the same Trust.

But I expect to hear it said from the Bar, and it has been said often, the Case of Child and Baily is a great Authority; so it is. But this I have to say to it, first, the Point resolved in Child and Baily's Case was never so resolved before, nor ever was there such a Resolution since. Pell and Brown's Case was otherwise resolved, and has often been adjudged so since. In the next place, I will not take much pains to distinguish Child and Baily's Case from this, tho' the word (Assigns) and the grant of the Remainder by the Mother, who was Executrix, are things that Rolls lays hold on as Reasons for the Judgment. But I know not why I may not, with Reverence to the Authority of that Case, and the Learning of those that adjudged it, take the same Liberty as the Judges in Westminster-Hall sometimes do, to deny a Case that stands single and alone of it self. And I am of Opinion the Resolution in that Case is not Law, tho' there it came to be resolved upon very strange Circumstances to support such a Resolution; for the Remainder of a Term of Seventy six Years is called in question when but fifteen Years of it remained, and after the Possession had shifted hands several times, and therefore I do not wonder that the Consideration of Equity swayed that Case.

But I put it upon this point; pray consider, there is nothing in Child and Baily's Case that doth tend to a Perpetuity, nor any thing in the Settlement of the Estate there, that could be called an Inconvenience, nor any Rule of Law broken by the Conveyance; but it is absolutely a Resolution quia volumus. For it disagrees with all the other Cases before and since; all which have been otherwise resolved;

but

but it is a Resolution, I say, meerly because it is a Resolution. And it is expressly contrary to Wood and Saunders's Case, which no Art or Reason can distinguish from our Case or that. For here was that Case which was cited and minced at the Bar, but never answered. Wood and Saunders's Case is this: To the Husband for sixty Years, if he lived so long; to the Wife for sixty Years, if she lived so long, then if John be living at the time of the death of the Father and Mother, then to John; but if he die without issue, living Father or Mother, then to Edward. Suppose these Words (living Father or Mother) had been out of the Case, and it had been to John, and if he die without issue, to Edward, will any Man doubt, but then the Remainder over had been void, because it is a Limitation after an Express Entail? How came it then to be adjudged good! because it was a Remainder upon a Contingency, that was to happen during two Lives, which was but a short Contingency, and the Law might very well expect the happening of it? Now that is this Case. nay ours is much stronger; for here it is only during one Life, there were two.

Remainder upon a Contingency that may happen in a short time, good.

The Case of Cotton and Heath in Rolls comes up to this: A Term is devised to A. for eighteen Years; the Remainder to B. for Life, the Remainder to the first Issue Male of B. which is a contingent Estate after a Contingency, and yet adjudged good, because the happening of the Contingency was to be expected in so short a time. Now that Case was adjudged by my Lord Keeper Coventry, Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, as Wood and Saunders's Case was by my Lord Keeper Bridgman, Mr. Justice Twissden, and Mr. Justice Rainsford; so that however I may seem to be single in my Opinion, having the misfortune to differ from the three learned Judges who assisted me, yet I take my self to be supported by seven Opinions in these two Cases I have cited.

Roll. Abr. Tit. Devise 612.

Cases in Chancery, 1 Part. 131.

If then this be so, that here is a Conveyance made which breaks no Rules of Law, introduceth no visible inconvenience, labours not of Perpetuity, tends to no ill Example, why this should be void only, because it is a Lease for Years, there is no Sense in that.

Now if Charles Howard's Estate be good in Law, it is ten times better in Equity. For it is worth the considering, that this Limitation upon this Contingency happening, (as it hath, God be thanked) was the considerate Desire of the Family, the Circumstances whereof required Consideration, and this Settlement was the Result of it, made with the best Advice they could procure, and is as prudent a Provision as could be made. For the Son now to tell his Father that the Provision that he had made for his younger Brother is void, is hard in any Case at Law; but it is much harder in Chancery, for there no Conveyance is ever to be set aside, where it can be supported by a reasonable Construction, and here must be an unreasonable one to overthrow it.

No Conveyance to be set aside in Chancery, where it can be supported by a reasonable Construction

I take

Expedition as
much the
Right of the
Subject as
Justice is.

I take it then to be good both in Law and Equity; and if I could alter my Opinion, I would not be ashamed to retract it; for I am as other Men are, and have my Partialities as other Men have. When all this is done, I am at the Bar desired to consider further of this Case: I would do so, if I could justify it; but Expedition is as much the right of the Subject, as Justice is, and I am bound by Magna Charta, Nulli negari, nulli differe Justitiam. I have taken as much pains and time as I could to be informed; I cannot help it if wiser Men than I be of another Opinion; but every Man must be saved by his own Faith, and I must discharge my own Conscience.

Of Cases ad-
journ'd Prop-
ter Difficulta-
tem.

I have made several Decrees since I have had the Honour to sit in this Place, which have been reversed in another Place, and yet I was not ashamed to make them, nor sorry when they were reversed by others. And I assure you, I shall not be sorry if this Decree which I do make in this Case be reversed too; yet I am obliged to pronounce it, by my Oath and by my Conscience. For I cannot adjourn a Case for difficulty out of an English Court of Equity into the Parliament; there never was an Adjournment Propter Difficultatem, but out of a Court of Law where the Proceedings are in Latin. The Proceedings here upon Record are in English, and can no way now come into Parliament, but by way of Appeal, to redress the Error in the Decree. I know I am very likely to err, for I pretend not to be infallible; but that is a thing I cannot help. Upon the whole matter, I am under a Constraint, and under an Obligation which I cannot resist. A Man behaves himself very ill in such a Place as this, that he needs to make Apologies for what he does; I will not do it. I must decree for the Plaintiff in this Case, and my Decree is this:

The Decree.

That the Plaintiff shall enjoy this Barony for the residue of the Term of Two hundred Years; the Defendant shall make him a Conveyance accordingly, because he extinguished the Trust in the other, and the Term contrary to both Law and Reason, by the Merger and Surrender, and common Recovery. And that the Defendants do account with the Plaintiff for the Profits of the Premises by them or any of them received since the Death of the said Duke Thomas, and which they or any of them might have received without wilful default; and that it be referred to Sir Lacon William Child, Knight, one of the Masters of this Court, to take the said Accompt, and to make unto the Defendants all just Allowances; and what the said Master shall certify due, the said Defendants are to pay unto the Plaintiffs, according to the Master's Report herein to be made: And that the Defendants shall forthwith deliver the Possession of the Premises to the Plaintiff, and that the Plaintiff shall hold and enjoy the said Barony of Grostock, with the Lands and Tenements thereto belonging, for the residue of the said Term of Two hundred Years, against the Defendants, and all claiming by, from, or under them.

them. And it is further ordered and decreed, That the said Defendants do Seal and Execute such a Conveyance of the said Term to the Plaintiff as the Master shall approve of, in case the Parties cannot agree the same; but the Defendants are not to pay any Costs of the Suit.

Die Veneris, 19 Junii, 1685.

After hearing Council two several Days upon the Petition and Appeal of Charles Howard Esq; shewing, That his Father intended a Provision for his younger Children, by Deed, made by Advice of Eminent Council, and did settle the Barony of Grostock, and other Lands, of the Value of Five hundred Pounds per Annum, in Trustees, in order thereunto; and that after a long Suit in Chancery, wherein the Petitioner was Plaintiff, against his Grace the late Duke of Norfolk, the Marques of Dorchester, Henry Lord Mowbray, and Richard Marriot Esq; Defendants, the Cause coming to be heard before the Lord Chancellor Nottingham, on the 17th of June, in the four and thirtieth Year of his late Majesty's Reign, of Glorious Memory; who after several Days hearing, did declare his Opinion to be, That the Petitioner had a good Title to the Barony of Grostock, and other the Lands in question; and decreed the Defendants to account to him for the Profits thereof by them received after the Death of Thomas, late Duke of Norfolk; which Decree was signed and enrolled, and the Petitioner actually vested in the Possession of the said Manors and Premises; and further sheweth, That the Defendants, the late Duke of Norfolk, the Lord Mowbray, now Duke of Norfolk, and Richard Marriot, exhibited a Bill of Review into the High Court of Chancery, for reverting the said Decree; to which the Petitioner put in a Plea, and Demurrer: Which being argued on the 15th of May, in the five and thirtieth Year of the Reign of our late King Charles the Second, before the Right Honourable the Lord Keeper of the great Seal of England, who after hearing Council on both sides, over-ruled the said Plea and Demurrer, and reversed the Decree aforesaid; and ordered a Writ or Writs of Restitution, to be directed to the Sheriffs of Cumberland and Westmorland, to put the Plaintiffs in the Bill of Review in Possession; which accordingly was done, as in the Petition, amongst other things, is suggested; and prayed a Reversal of the last Decree; as also upon Answer of the Right Noble Henry Duke of Norfolk, Earl Marshal of England, and Richard Marriot Esq; put in thereunto. And after due Consideration had of what was offered at the Bar

The Decree affirmed in Chancery.

P

by

by Council on either part thereupon, it was ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, That the said Decree made in the High Court of Chancery, on the 15th of May, in the five and thirtieth Year of the Reign of the late King Charles the Second of Glorious Memory, in behalf of the late Duke of Norfolk, and Richard Marriot Esq; be and is hereby reversed; and that the Decree made in the said Court of Chancery, on the 17th of June, in the four and thirtieth Year of his late Majesty's Reign, in behalf of Charles Howard Esq; the now Petitioner, Be, and Is hereby affirmed.

JOHN BROWNE, Cler. Parl.

THE

THE ARGUMENTS

OF THE

Lord Keeper *SOMERS*,

THE

Lord Chief Justice *HOLT*,

Lord Chief Justice *TREBY*,

AND

Mr. *BARON POWEL*,

When they gave JUDGMENT for the

Earl of *BATH*.

Die Martis 12 Decembris, 1693. In the *Middle-Temple-Hall*, Com. *Mountague* & alii versus, Com. *Bathen*. & al. & econtra.

This Day being appointed by my Lord Keeper to hear the Opinions of the Two Chief Justices, and Mr. Baron Powel, who assisted at the hearing of this Cause, and to deliver his Lordship's own Judgment therein; Mr. Attorney-General moved on the behalf of the Earl of Mountague, &c. for the Judgment of the Court; and Mr. Baron Powel delivered his Opinion first.

Mr. Baron Powel. The Question in this Case is, Whether there be any ground in Equity, to set aside a Deed of Release, made in July 81, for the Settlement of the late Duke of Albemarle's Estate; Baron Powel's
Arguments.

by

Vid. the Case at large, inf.

Whether a Deed on which a Tryal at Law hath been, may be set aside in Equity.

Objections.

That, it having been affirmed by a Verdict at Law, it ought not.

Answer to the first Objection. Surprise, what.

Surprise not sufficient to set aside a Deed after a Verdict, unless mix'd with Fraud.

by which my Lord of Bath claims. The Validity of this Deed hath been tried at Law upon an Ejeaement in the Court of King's-Bench, by Direction of this Court, where the Title has been found for the Earl of Bath by the strength of this Deed: So that it must be agreed my Lord of Bath hath a good Title at Law, because the Verdict hath found it so, and all Parties concerned have hitherto acquiesced under this Verdict.

This Case comes now back upon the Equity reserved, and it is only now to be considered, what matters of Equity have been offered to avoid this Title thus found at Law. And those I think may be reduced to five Heads.

First, That this Deed was obtained by Surprise and Circumvention.

Secondly, That it was a Concealed and a Forgotten Deed.

Thirdly, That this is a Deed attendant upon a Will, and so revocable in its own Nature, altho' it had no Power of Revocation in it.

Fourthly, That there is an implied Trust in this Deed, that the Duke might have charged the Estate to the full Value, and consequently might well dispose of it in Equity.

Fifthly, That the great Solemnity and Deliberation used about making the last Will, and the publishing that Will, do amount to a Revocation in Equity. notwithstanding that the Circumstances of the Power are not strictly pursued.

I am of Opinion in this Case, that this Deed having been affirmed by a Verdict upon a solemn Tryal at the Bar at Law, none of these matters are sufficient for to ground a Decree in a Court of Equity, to set aside this Deed; and I shall give you my Reasons for this Opinion in the same order I mentioned those Heads in, with particular Answers to the particular Objections under each Head.

1. It is said, This is a Deed that was obtained by Surprise and Circumvention. Now I perceive this word Surprise is of a very large and general Extent. They say if the Deed be not read to, or by the Party, that is a Surprise: Nay the Mistake of a Council, that draws the Deed either in Misrecitals, or other things, that is a Surprise of a Council, and the Surprise of the Council must be interpreted the Surprise of the Client. These things have been urged in this Case, and I thought fit to mention them for the introducing my Reason against this Head of Argument: And it is this:

That if these things be sufficient to let in a Court of Equity to set aside Deeds found by Verdict to be good in Law, then no Man's Property can be safe: I hardly know any Surprise that should be sufficient to set aside a Deed after a Verdict, unless it be mixed with Fraud, and that expressly proved; and I know not of any such proved in this Case.

It is true, Duke George by his Will, and the Settlement made upon his Son at his Marriage, takes no notice of, nor makes any Provision

Provision for the Earl of Bath; but that, I take it, is not to be regarded as any way material at all, because he takes no notice, in either of them, of any body else but him that was his heir. But I must observe here by the way, that there was not only a very near Relation between Duke George and the Earl of Bath, but a very intimate Friendship cultivated by mutual Offices of Kindness between them to his Death. And I must mention one particular, because to me it seems a clear Answer to this Objection, that is, his making no Provision for the Earl in the Will, or Settlement, might be the Occasion why Duke George did make such an earnest Application to King Charles the Second, that upon failure of his Issue Male, his Majesty would be pleased to bestow the Dukedom upon the Earl, and annex Theobalds to it, which would then revert to the Crown. And that King did often promise he would, and afterwards did it solemnly under the Sign Manual.

But then it is said, that after this D. Christopher made his Will, and therein there is no notice taken of any such Disposition of his Estate to the Earl of Bath; But that is not, I think, to be regarded neither, because that was a Will only of his Personal Estate, and made when he was under Age, and could not dispose of his Real Estate.

Then come we to the Year 1675, when the Will was made, to which this Deed has some relation, and by that Will D. Christopher doth settle a great part of his Estate, upon failure of Issue of his own Body, upon my Lord of Bath. There is no pretence of any surprize upon the Duke when he made his Will, and it is plain then he had an intention that my Lord of Bath should have a great Share in his Estate if he died without Issue.

Now then it is to be considered what there is of Proof in this Case, of any thing that might be a ground to conceive why he should alter this intention between the Years 1675 and 1681, when this Deed was made. There is no proof of any misunderstanding between the Duke and the Earl in that interval; but on the contrary, that there was a continual friendship and intercourse of Kindness between them all the while, as doth appear by a continual Succession of Letters and other Correspondencies passing between them in those Years, one of which I cannot chuse but take notice of, because of the Date to it, to wit, in June 1681. upon my Lord Landstown's intention to travel; wherein the Duke takes notice of the Interest he had in my Lord of Bath's Family, and particularly in his eldest Son, as the greatest, next to that of the Earl himself: And, I say, I mention this Letter because of the Date, that it is so very near the Date of the Deed, that it is possible the Deed was then made, because it was within a month after that Letter, Sealed and Executed; therefore it might well be referred to in it.

Next this appears to be a Deed drawn by the D. of Albemarle's own Council, Sir Thomas Stringer; for it is proved the Paper-draught is all of his Son's Hand-writing, except the first and last Sheet, and all of it interlined with Sir Thomas his own Hand: Errington has proved the Abstract of all Sir Thomas his Hand, with the very Date in it, and swears that Sir Thomas examined it with him. Now is it to be imagined that Sir Thomas Stringer should prepare such a Settlement for the Duke to execute without any Order or Instructions from him about it? No, certainly that can't be thought. But they say Sir Thomas Stringer, if he did draw it, might forget it, or overlook it, and he now denies any knowledge of it. Truly I cannot value much what Sir Thomas Stringer has sworn in this Case, he is not consistent with himself, and makes but a very odd Figure in the Cause.

Mr. Stringer. My Lord, I beg your Pardon for interrupting Mr. Baron Powel, but I must vindicate my Father; he never swore a word in this Cause.

Lord Keeper. No, he did not, he was dead before the Cause came into Court. That was a mistake.

Mr. Baron Powel. I am sure there was Oath of what he had said about this Deed.

Mr. Stringer. That, my Lord, you may make what you please of, but he never made any Oath in the Cause.

Mr. Baron Powel. But that which I mention him for, was, that there is Proof apparent that he was advised with about this Deed; and he was the Duke's constant Council. I do not think, I confess, that Sir William Jones did draw this Deed; it is not insisted upon by the Council of my Lord of Bath that he did; and any one that considers the Frame of it will think as I do. But I conceive he was advised with upon the Proviso, and the writing in the Margent against the Proviso; I approve of this Proviso, I believe it to be his Hand, though several Persons of good Credit, that were well acquainted with his Hand, have sworn they believe it not to be his Hand. But they might be mistaken, and to me it appears by the comparison of the Records, Deeds and Papers in open Court; for it is plain, according to the various nature of the several things he writ, or set his Hand to, he did write several Hands, and particularly wrote his Name sometimes one way, and sometimes another. And therefore upon comparison of that with other Papers, I do believe it to be his Hand.

The next thing I would mention is this; here are six subscribing Witnesses to the Sealing and Executing of this Deed at Albemarle-House, of which Sir William Jones was one: And one Alleman, that is one of the Witnesses, swears, that when the Duke delivered the Deed to the Earl of Bath, he wished he could have done more for him. It was probable then the Duke believed he had done something for him; and it is very probable too, he knew what he had done for him, when he wished he was

able

able to have done more. And Mr. Prideaux swears, (tho' he does not exactly fix the Time) that the Duke told him himself, he had settled his Estate upon the Earl of Bath. Then I say, it is hard to believe the Duke was surprized in making this Deed, when his own constant Council drew it, so able a Council perused and approved so main a part of it, and was present at the Execution of it, and he should express his Wishes to be able to do more, can he be supposed not to know what he did?

But now let us examine the Evidence and Objection on the other side: They said it doth not appear that this Deed was ever read to the Duke, or by him. It is indeed proved the last Will was read to him by my Lord Ch. Justice Pollexfen, but not at the same time of the executing of it. But however I think the not reading of a Deed to, or by the Party that executes it, is a very slender Objection to make out a Surprize, so as to set it aside. That would shake many a Conveyance; I doubt it would shake many Deeds that were made and executed by the Duke. For tho' he was so cautious as some of their Witnesses say, that he would not execute any Deeds, but what his Council set their Hands to, yet I do not find that any of them used to be read to him, or he himself read them at the time he sealed them. Therefore it is a dangerous Doctrine to set aside a Deed upon such an Account. Some People will not have leisure to hear Deeds read, or read them themselves.

The not reading a Deed to, or by the Party that executes, a slender Objection to make out a Surprize.

Then they object the mistakes and misrecitals of the Limitations of the Will in the Deed, which refers to the Will, as particularly that of Norton Disney, and some others of less moment: But God forbid that the mistake of a Council in a Recital in a Deed, should be of that great moment as to set aside the Deed when executed by the Party.

But there is another matter much insisted on by them as an Argument of Surprize; that is, this Deed is pretended to be made in Confirmation of the Will in 75, and yet it varieth from that Will in almost all the Limitations of the Estates, except in some part of that to my Lord of Bath. I confess I have look'd over the Variations, and there are several, but I have this in general to say to it, that I take it this Deed was made for the sake of the Earl of Bath; and that it was for the Earl's better Security, that he bound himself up by so strict a Proviso not to revoke. And if you look into the Deed, it will be found to confirm the Will as to my Lord of Bath, which was the main Point of both Deed and Will. For it sets the Estate given to him upon a firmer foot than it was by the Will which was revocable in its nature: Therefore it must be intended, as no doubt it was, for that very purpose to secure it more to my Lord of Bath, than it was by the Will.

But that which is said to be an Argument of the greatest weight and moment in this matter, that there must be Surprize in

in the Case, is this; it is hardly to be believed, and almost impossible, that the Duke should send for Mr. Monk out of Holland, by his Will desire the King to bestow upon him the Barony of Potheridge, the ancient Seat of the Family, make a disposition of his Estate by a Will so solemnly prepared and deliberated upon, take care to have three Parts of it; one whereof was to be transmitted to the Dutchess of Newcastle, another Part delivered by himself to Mr. Monk, and the third Part taken with him to Jamaica, and there pulled out and declared to be his Will, and yet intend no real disposition of his Estate by all this. These are Things so dishonourable to the Duke, that they are not easily to be believed of a Man of his Honour and Quality.

I confess this is an Objection of great weight, and carrieth much Presumption with it, but it is Presumption only, which how far it shall conclude against a Verdict, is left to Consideration. But besides, I would put the Case upon a like bottom of Presumption the other way, and then let what we shall make of it. Duke George prevails with K. Charles II. to promise to make the Earl of Bath Duke of Albemarle, upon his failure of Issue Male: Duke Christopher, when he comes of Age, doth make a Settlement of his Estate upon the Earl of Bath upon failure of Issue of his Body. The Earl of Bath is a Person that doth heap Obligations upon both Dukes and their Family, is Assistant to the Duke, both in the Purchase and Sale of Albemarle-House, is continually the chief Person concerned in all his Affairs, nothing almost is done without him. There is no Proof of any Misunderstanding, or Ground for any, between them. Nay, it was the Report in the Family, that if the Duke died without Issue, the Earl of Bath was to have the Estate: He and Sir Walter Clarges are the Duke's near Relations; whereas Mr. Monk, that I said, is not in the Case proved to be at all a-kin to him, and so we must not make him to be related without Proof, but only that the Duke called him Cousin.

Now after all this, that the Duke should make his last Will, and give all this Estate to a Stranger (for so as to any thing appears in Proof) and give nothing to the Earl of Bath, when by the former Settlement he had given him such Hopes of so great a Share; this I think is a very unaccountable thing; and, I confess, I know not how to extricate my self out of the Confusion it causes in me; but I must set the one against the other as to that Objection, and leave the Matter in the dark, as to the Duke's Honour, as I found it; tho', I think, I may give a further Answer to this Objection under the second Head.

But I must speak something more under this Head, for I would omit nothing that I conceive to be material in the Case. There is another thing objected that seems dark in this Case, and that is, what was the meaning of some Parchments that were ingrossed by Thompson, the Summer before the Duke went to Jamaica? The Jury have found that this Deed was
executed

executed in 81: And if then the other side would make use of this, as insinuating that they were the same Deeds, then that is not to be admitted, as being expressly against the Verdict. But to me it seems, that these Deeds in 87 were made upon some Design to have them executed, then perhaps to settle the Estate upon a firmer foot than it was thought before. The Earl of Bath perhaps might be jealous that the Dutcheſs might prevail upon the Duke to revoke the former Deed in due Form; and therefore these Deeds might be prepared absolutely without any Power of Revocation, and thought he might procure the Duke to seal them so before he went to Jamaica: I say that might be the Intention, tho' what was the Design I cannot really tell.

But admitting that such Writings were prepared with such a Design to get the Duke to execute them, I know not that all this put together will be a sufficient Ground in Equity to set aside the Deed in 81. For all designs in gaining of Deeds will not avoid Deeds actually made: And that is plain from the Case of Bodmin and Roberts, that was one of the Precedents used in this Case, which was in short thus.

Mr. Roberts, Son to the late Earl of Radnor, married the only Daughter and Child of Bodmin, who was so passionately fond of his Daughter, that whenever she was in his Presence, he would break out into great Fits of Passion, and weep for Joy to see her. Notwithstanding this great Fondness of his Daughter, one Mr. Wynne took an Opportunity when Mr. Bodmin was under an Arrest, and officiously came to bail him, and insinuates into him, That his Son-in-Law was the Occasion of his being arrested; and thereupon wrought so far upon him as to get him into a private Place, where he was removed out of his Son and Daughter's Knowledge, and where he went by a strange Name: No one of his Friends had any access to him but Wynne himself, and such as he would permit. Mr. Roberts made frequent Application to be admitted to him, but was refused, which was all in Proof. While he was under this Concealment, Wynne tampers with one Barry that had Mr. Bodmin's Will in his Custody, and would have had him suppressed that Will, whereby he gave his Estate to his Daughter. It happens, during his being thus secured, he fell sick, then there is a Will prepared for him to give this Estate away to Wynne from his only Daughter; they get three Witnesses to the execution of it. This Will was never read over to him; this appears in the Proof; but they get him to execute it: And he dies. Whereupon Mr. Roberts exhibits his Will in this Court to set aside this Will. There was Proof made of all this Matter that I have opened, and this Point of Surprise in obtaining this Will was insisted upon strongly. The Lord Chancellor at the hearing of the Cause was assisted by the Chief Justice Bridgman, the Chief Baron Hales, and Justice Rainsford. But notwithstanding all this Proof, they could not prevail to set aside this Will in this Court; and afterwards when they came into the House of Lords, they were of the same Opinion, and it ended at last in Relief by the Legislative Power, an Act of Parliament.

*Bodmin and
Roberts's Case*

R

This

This now I take to be much stronger for Relief, if any could be, than the Case now in question; and if then upon such apparent Surprise and Practice it could not be set aside in Equity, sure this can't, where there doth appear no Proof at all of any such thing.

Answer to
the Second
Objection.

2. I come then to consider the Second Head of Argument against this Deed, that it was a Concealed and Forgotten Deed. Now that it was concealed from the Dutchess, and those that were thought her Agents, I agree it so; and it is plain, it was always intended it should be so. But that it was concealed from the Duke, I think has no Ground at all. The thing they would infer it from is the Evidence of Aleman, whose Testimony was read once and again: And he says this Deed, at the time of the execution of it, was delivered to the Earl of Bath; whence they infer he carried it away, and kept it concealed from the Duke, who forgot it: But upon reviewing Aleman's Deposition, it can be understood to mean no other, but only delivered to that effect as a Deed to his use; but not that it was delivered to him for Custody, and carried away by him.

No truly, it seems plain to me from all the Proofs and Circumstances of the Case, that this Deed did remain in the Custody of the Duke of Albemarle; for that Sir Thomas Stringer, a little before the Duke went into Jamaica, doth draw an Abstract of it, in which the very date is mentioned; which could not be drawn from the Paper-draught, where the date is in Blank, but must be from the Deed it self: And how should he have the Deed to do it by, unless it was in the Duke's Custody?

Besides, there is a strong Proof, that the Will of 75 was in the Earl's Custody once; for the Duke sent to him into the Country for it, and the Earl brought it up with him; for it is plain by the wording and framing of the last Will in 75, my Lord Chief Justice Pollexfen had it in his Custody for comparing the one with the other; they run so in the same manner, that it is impossible but he that drew the last, must have the first by him at the same time.

How then came this Deed of 81, and this Will of 75, into the Custody of the Earl of Bath, under the same Cover, with the Seal of the Duke of Albemarle's Coat of Arms on't? For so it was produced first by the Earl of Bath, after the notice of the Duke's death in Jamaica. This cannot be imagined how it should be any otherwise, than as the Earl of Bath says in his Answer, that they were deliver'd so to him by the Duke a little before his going beyond Sea; or else that the Earl of Bath found them so sealed up and covered among the Duke's Writings. And either way it is a mighty strong Proof, that the Deed was all along, till he went to Jamaica, in his own Custody, and not in the Earl of Bath's.

But however it is further objected, that it was a forgotten Deed. Methinks what I last urged is a very good Proof it was not forgotten; but there is yet further Proof of it. Not long before he went abroad, the Duke had some discourse with Mrs. Crofts, who (as

the Swears) was told by him, That he should have a good Neighbour at Newhall if he should miscarry beyond Sea, to wit, my Lord of Bath. And Lane, that is one of the Duke's Servants, doth swear, That the Duke told him, that after his death the Earl of Bath would have Newhall. Mr. Crofts swears, That upon his Application to know who he should address to in case of his Grace's death, the Duke told him, all he could do for him, was to recommend him to the Earl of Bath and Sir Walter Clarges, and ordered him to leave the Keys of his Writings with the Earl of Bath; for he was most concerned in them, in case he should do otherwise than well.

It is proved, that the usual discourse of the Family was, That the Earl of Bath would have the Estate after the Duke's death, which must happen from some Expressions of the Duke to that purpose. And Sir Walter Clarges doth in his Answer swear, That the Duke told him he had provided for him, as the Earl of Bath knew, which could be only by this Deed. And Mr. Greenville swears in his Answer much to the same purpose. And Mr. Courtney swears, That eight or nine Years ago, my Lord of Bath came to him with a Draught of a Settlement to the same effect, to advise upon: And about three Months before the Duke went to Jamaica, he came again with a Copy of this Settlement, to advise, whether a Will would revoke it; and that he gave his Opinion it would not, if the Circumstances of the Power were not pursued.

But now here the Objection recurs again: Is it possible to be believed that the Duke should deliberately make so solemn a Will, take six Months time in the drawing and publishing of it, and then execute it in the Presence of three Witnesses, if he had not forgot this Deed, but had known all along that there was such a one? If he did know it, and had acquainted the Council that drew his Will with it, certainly he would have advised him, that unless he did revoke it, according to the Circumstances of the Power, all this Care and Solemnity would signify nothing.

Truly on the other side it is to be considered, whether the six Months was taken up in deliberation and solemn preparation for making of that Will; or, whether that was not an Evidence of a difficulty to prevail upon the Duke to do it at all: For I must take the Liberty to say, there are Proofs in the Case of Importunities used to bring him to it. Dr. Benwick did tell the Duke, unless he did it, the Dutchess would have a Return of her Distemper, and be very bad again. It is proved, that when Money is to be paid for the Councils Fees, upon drawing it the Duke was uneasy, and said, the Dutchess might pay it if she would, for it was her Business. There appears great difficulty afterwards to get him to execute it, that Sir Thomas Stringer importuned him much to it; upon which he grew very much in favour with the Dutchess, and there was Enquiry made for a Baronet's Patent to be got for him; all to engage him the more to get this Work done: How doth

doth he bring it about? The Duke was that day to go by Appointment to Sir Robert Clayton's, to meet with my Lord Jefferies, and seal the Deeds of Purchase of Dalby and Broughton. Sir Thomas takes this Will in three Parts, and three Witnesses along with him to Sir Robert's; and after my Lord Jefferies was gone, and the Duke in a fretting discontented Humour, he gets him into a private Room in that House, and then tells him he had brought his Will to him to seal; and the Duke, as Mr. Crofts swears, was unwilling to do it then, and would have put him off; but he pressed the Duke very hard to do it then, and told him he must do it, for he was to be gone the Northern Circuit the next day, and could not be at the Execution of it; upon which he did it, but not till after much urging and solicitation.

Now I would argue hence, Why should the Duke of Albemarle be uneasy, and disturbed, at his being importuned to execute this Will, after so much Pains and so much Time in the drawing and preparing it? I cannot imagine any Reason why, but that he had not forgotten this Deed, which he never intended to alter, and yet must do something to satisfy some Body's Importunity. He knew he should, in doing it, do a thing that would look very oddly one day, and that made him so uneasy, tho' at last he did comply and did it.

But admit this Deed had been at that time forgotten by him, or concealed from him, would this in a Court of Equity be a sufficient Ground to set it aside? I confess of a Purchaser, where one that claims by such a Deed, will stand by and permit the Purchase to go on, and conceal the Deed; as to that Purchase, the Deed will be a fraudulent Deed: But there is nothing of that in this Case, neither such a Purchase nor such a Concealment; and therefore it can signify nothing here to set aside this Deed, tho' concealed and forgotten.

Answer to
the Third
Objection.

3. But now I come to a Third Head of Objections: That this Deed is a Deed attendant upon the Will of 1675, and so revocable in its own Nature, as a Will would be, although it contained in it no Power of Revocation. This was very warmly insisted upon by the Council of Mr. Monk.

A Revocable
Deed atten-
dant upon a
Will which
is revocable,
what.

I confess there is such a thing as a revocable Deed attendant upon a Will, which is revocable; that is, where a Man doth suffer a Common Recovery, and make a Deed subject to his last Will and Testament; such or such a Use may be declared by Indenture under Hand and Seal, as intended at that time of the Recovery. But this Indenture, after it hath declared that Use being founded upon an Assurance that was always subject to Uses declared in his last Will, that Will being always changeable, the Deed may be always changeable: And so is the Case in Dyer 314. b. And the Reason is given in my Lord of Ormond's Case, in Hobart 349. by the Opinion of two Judges against one, because the Foundation, which is his last Will, is always revocable. But such an Indenture to
I
declare

declare Uses is revocable; but a Feoffment, or a Lease, and Release to uses referring to a Will, or made to Confirm a Will, that that should be revocable, there is no Colour nor any Authority in Law for it.

4. The fourth head is, That there is an implied trust, that the Duke might charge this Estate to the full value; therefore in Equity he might dispose of the Land. This Objection does arise upon a variance supposed between the ingrossed Deed and the Paper-draught: for it should seem that one of the sheets in the Paper-Draught is cut just where this trust is declared, and so they will presume it a general trust which would subject the whole Estate to the Duke's disposal.

Ans. to
the fourth
Obj.

But as to this matter, it is sworn by Thompson, who ingrossed the Deed, that he ingrossed it by the Paper not Cut, and did ingross it truly according to the draught, and he was believed by the Jury so to have done: Therefore I suppose it was Cut since; and if it were, the question is by whom it was Cut? Truly, I think it not worth the trouble of enquiring after that, but it is most probable it was not Cut by those to whose advantage it would turn to Cut it.

But here doth arise a considerable Objection, by the Will of 75 there are 20000 l. Legacies given, and here is a trust that doth subject this Estate to the legacies of that Will of 75: Shall then the Earl of Bath hold this Estate free and discharged of any legacies by the last Will?

I must confess this was objected on one side, but not debated on the other side, because they that were of Council for the Earl of Bath, thought it did not concern this question now in debate. That they said might be a question another time between my Lord of Bath, and any persons that may come here to have any legacies given them by the Will of 87. If the personal Estate will not answer, I cannot say positively that they may be payable out of this Trust, tho' I give no opinion in the matter, it not having been debated, and so I have not considered it.

But sure the consequence of that, if it should be so, would not be what this head of Arguments I am upon would infer: That if the Duke might charge the Estate with legacies, therefore he might dispose of it, for he hath bound himself by this Proviso not to dispose of it but under such and such terms.

5. And that brings me to the last head; whether this Will of the Duke of Albemarle, made 1687, and so solemnly done, be a Revocation in Equity, tho' it do not strictly pursue the Circumstances of the Power.

Ans. to
the fifth
Obj.

I know not any Rule more clear in our Law-Books than this, that all the circumstances, prescribed and required in a power of Revocation, must be observed to make it a good and effectual Revocation. So is Scroop's case; so is the case of Kibbet and Lee, there is indeed a favourable Judgment to be given

All the Circumstances prescribed in a power of Revocation must be observed, to make it good and effectual.

giving in expounding powers, but both those Cases still agree that all the Circumstances must be strictly observed.

At Law. It may be said then, they must be observed in Law, but in a Court of Equity it makes another Case: for when a man hath a power over an Estate, those circumstances are only a guard upon himself that he may not be surprized into a sudden disposition of it: But when deliberately and solemnly he hath done an Act whereby he disposeth of this Estate, but there wants some little ceremony or circumstance, such as the not tending 12d. or the like, a Court of Equity ought to supply such a defect to support his solemn Intention to dispose of it. For plain it is, he is not surprized into this Act, and so the Reason of those Circumstances does fail, and they need not be strictly observed.

Quere, in a Court of Equity.

No Conveyance at Common Law could have a power of Revocation annexed.

But a Condition might be annexed.

Power of Revocation first came in use after the Stat. 27 H. 8. c. 10.

This way of argument may seem specious in a Court of Equity, I confess; but really I think I am able to give a very plain Answer to it, and that from the nature of powers of Revocation, It is certain no Conveyance at the Common Law could have a power of Revocation annexed to it. As a Feoffment and Libery of Seisin; and that because the Law would not admit such an absurdity, that a man should give an Estate absolutely to another, and yet reserve a power to recall it from him at his pleasure. It is such a repugnancy as the Common Law will not permit. But a man might have done this at Common Law, he might have annexed a Condition to his Feoffment, that if he tendered 12d. to the Feoffee or his heirs he might enter upon the Estate. So that the Estate which was dejected out of him by the Libery of Seisin, might have been revested by a performance of the condition and Re-entry. So it stood at Common Law.

But after the 27th H. 8. for transferring uses into possession, uses become more pliable than conveyances at Common Law, wherein this matter, and then powers of Revocation first came in use and fashion. Not but that it is as repugnant to a Conveyance after the Statute as it was before, for certainly it is repugnant to give an Estate away, and yet have a general power over that Estate. But a power of Revocation was let in as a Condition, and would work as a Condition; but whereas the performance of a Condition at Common Law, would not work a revesting of the Estate, without a Re-entry; now the performance or execution of the power doth transfer the Estate to the new uses, or revest the Estate in him that had the power without any Re-entry. But still there is now a necessity of the powers being performed, as there was of the conditions being performed at Common Law; for it is the nature of a condition and no more. So is Inglefield's Case, 7 Co. 39.

There was a voluntary Conveyance made with a power of Revocation; and he who had the power is attainted of Treason. Now all Conditions forfeited to the Crown must be performed,

formed, or no advantage can be taken. This power was in this Case agreed to be forfeited to the Crown; the great difficulty was, whether the King could perform the condition, or whether the performance was not tied strictly to the person that had the power vested in him? That was the great doubt in that case, but there was no question but it was a condition, and the King should have it as a condition forfeited.

And it is likewise agreed in Co. Litt. 238. That it is a condition, and would have been repugnant to be a general power. So that it is not, as they say, a guard only upon a man's self to prevent Surprize, but a Condition. And as a man must perform a condition at Common Law to entitle him to a Re-entry, so he must execute his power, to entitle him to a Revocation. And a Court of Equity can no more let a man in to defeat an Estate upon a power of Revocation, without a due execution of the power, than the Common Law could let a man in to defeat an Estate upon a condition, without performance of the Condition, or than a Court of Equity can think to let a man in to defeat a voluntary Conveyance, without a power of Revocation: for it is all but a condition which must be performed, or no advantage taken of it; and a Court of Equity may do great things, but they cannot alter things, or make them to operate contrary to their essential natures and properties,

Where a Court of Equity may help, where not.

I confess where there is an impediment of executing a power of Revocation, or disability of doing it, a Court of Equity may perhaps interpose. And therefore suppose the Earl of Bath had always had this Deed in his custody from the time of executing it, and the Duke having a mind to revoke it, had sent to the Earl for it; that tho' seeing the circumstances required he might truly pursue them, but the Earl had refused to deliver it, and the Duke not knowing what the power was, had done such Act with a mind to revoke it; I agree it reasonable, that a Court of Equity should interpose to support it. But why is that? because the Earl who was to have the benefit by this Deed, was the impediment why it was not strictly pursued.

And that is a Reason which would prevail at Common Law. I will put you a Case to prove it, Dyer. 354. A. makes a Feoffment to B. with a power of Revocation; if A. at any time during his life pay or cause to be tendered to B. at the Font-stone in the Cathedral at Sarum 20 l. A. tenders the 20 l. at the place in the absence of B. and without any notice to him to attend: this is held to be no Revocation. But saith the Book (as it should seem) if he had sent to B. to be there, or some for him to receive the money at the tender, and B. would neither have come nor sent, it had been a good Revocation. So that where there is an impediment by the default of the party who is to have advantage by the non-performance of the power; and he that hath the power do an Act that expresseth his meaning to revoke, that shall be a good Revocation at Law.

I likewise agree, that in case of disability a Court of Equity may interpose; and I agree therefore, that in case the Duke of Albemarle had taken this Deed over with him to Jamaica, and there had had an intention to revoke it, and had gone as far as he could to do it, had made his Will, and had six Witnesses to it, I believe it would be a good Revocation in Equity, tho' none of the Witnesses were Peers, because of the disability he would be under to have such Witnesses.

And so that defeasible Executions of powers of Revocations may be helped in Courts of Equity, in the Cases of Purchasers, and Creditors, I take it to be true too. And it is said other particular Cases there may be, wherein a Court of Equity can relieve, tho' the Revocation be not according to the power reserved. And as to that, I confess several Precedents have been cited, and I wonder, considering the nature of them, that more have not been mentioned; but I think there are not above 4 or 5 very much to the purpose, and those I shall take notice of, and trouble you with no more.

Where acceptance makes a breach in form.

The first is the Case of Thorne and Newman; and that Case is no more in short than this. A. Covenants with B. to stand seized to uses with a power of Revocation upon the tender of 12d in the Temple-Hall. A. tenders the 12d to B; who accepts it, but not in the Temple-Hall. The question was, whether this was a good Revocation in Equity? truly I believe it was a good Revocation in Law.

But suppose a man make a Lease reserving a Rent payable at Michaelmas in the Middle-Temple-Hall, and there is a proviso of Re-entry upon non-payment according to the Reservation. The Rent is paid by the Lessee at the day, but not at the place; and the Lessor accepts the Rent, and afterwards Re-enters for breach of the condition. If he have once accepted the Rent, being privy to the Deed, that makes it a good performance of the condition in Law absolutely. So is Co. Litt. 212.

And so it is in case of a Bond to pay money at a day and place certain; the money is paid before the day, and not at the place, and the obligee accepts the money. If he after bring an Action upon this Bond, the Defendant can plead nothing but payment according to the condition: And in Evidence he may give it in proof, that tho' it was not paid at the place and day, yet being received by the Obligee before the day at another place, this is good Evidence at Law of payment according to the condition: And that appeared in the case of Band and Richardson; Moor 267. Anderson 198. Cro. Eliz. 142. And this case of Thorne and Newman I take to be a good performance at Law; where indeed the condition is to be performed to a Stranger that will alter the case, but where it is to one that is privy to the Deed, I take it, it is a good performance at Law, and consequently must be good in Equity.

Another Case cited, was that of Smith and Ashton, and that was thus: One Richard Ashton conveys his Estate in Uses, with a Power reserved in the Conveyance by any Writing under his Hand and Seal, to make Provision for younger children. Being sick, he prepares Instructions under his Hand, in order for Counsel to draw it into form; and it is drawn into form and ingrossed: But before it is sealed, he dieth; and this was held a good performance of this Power in this Court. So here is a defect in the execution of a Power help'd in a Court of Equity.

As to this case, I would observe, first, this is not a case upon a Power of Revocation to divest an Estate, nor a Performance of a condition. But further, here are Instructions prepared, and it went as far towards the Execution of the Power as could be, till an Impediment came in the way by the Act of God in the Death of the Party. Now I agree, where there is an Impediment by the Act of God, or Fraud or Default of the Party, who claims by the Deed, Equity may interpose. But that does no way come up to the case in question.

Then there is the case of Dey and Thwaites, which was lately in this Court. Thwaites makes a Settlement to the use of himself for life and afterwards to such child and children, and for such Estate and Estates as he should by any Writing under his Hand and Seal testified by two credible Witnesses, limit and appoint. He afterwards makes a Will, and has but two Witnesses to it; (so that they did not cite the case right, that said there were not two Witnesses) But two Witnesses are not enough by the Statute to make it a good Will, and thereby he giveth a Rent of 100 l. a Year to such a child, and dies.

Now one great Question was, Whether the Power being to limit Estate or Estates, he might limit a Rent out of those Lands? It was held in Equity he might; and truly I think that he might at Law. There is, I confess, an Opinion against it in the case of Brown and Tayler, where there were three Judges against one. But really I think it is good at Law.

A second Question was, Whether this being void as a Will by the Statute, should be yet a good Declaration of the Trust, and an Execution of the Power? And I think the Court of Equity did very well in decreeing it to be good. For tho' it were not effectual in all Points (as it was intended) as a Will, yet it was a Writing which had all the circumstances required by the Power; and therefore I see no Reason to question whether it were good.

The next case is the case of Ward and Booth; and that stands thus: Sir Thomas Brereton made a Settlement, with a Power of Revocation, by a Writing under Hand and Seal by two Witnesses; and he in a Passion one Day tore off a Label, with the Seal, but afterwards repented, delivered it to the Trustees to be preserved to the Uses; And enquiring whether what he had done amounted to a Revocation? and being advised it did not, he was very well satisfied. This Cause came to be heard before my Lord Nottingham, and adjudged

Ward and
Booth's Case.

no Revocation, it appearing there was a continued Intention not to revoke. But I desire to read part of the Ground that Decree went upon, for that justifies what I said, in case where there is a Disability or an Impediment by fraud, this Court may relieve tho' there be a formal Revocation.

*Arundel and
Philpot's Case*

There is but one Precedent more that I shall mention, and that I take to be directly for the Earl of Bath. It is the Case of Arundel and Philpot. Mary Philpot being a Widow, seized of Lands, made a Settlement upon the Defendant, with a Power of Revocation upon the tender of a Guinea. She afterwards makes another Settlement upon the Plaintiff, but without any Proof of the tender of the Guinea. Upon a Bill suggesting her Intention to revoke, the Plaintiff could not prevail in this Court to set aside the first Settlement, but was dismissed to Law, and ordered to try the Title within a Twelvemonth, whether revoked or not revoked: And there was afterwards a Tryal, and the tender of a Guinea did happen to be proved, and so the Power was well executed at Law. But this Court would not interpose to set it aside as a Revocation in Equity, upon the Intention only, without a Proof of the due Execution.

Conclusion.

And upon the whole Matter I conclude, that in a Court of Equity there cannot be a Revocation of a Deed, to which a Power to revoke it annexed, but what is pursuant to that Power, unless there be either an Impediment from the Party that claims by the Deed, or a real Disability to execute according to the Circumstances. And I think neither of these are in this Case, nor are any of those Matters alledged of Surprise, Circumvention, Concealment, or the like, any good Grounds to set aside this Deed, if they were proved, which I think there is no Pretence of.

Lord Chief Justice Treby.

*Chief Justice
Treby's Argument.*

I Am of the same Opinion with my Brother Powel: I shall state the Case as it stands upon this Deed and Will. The Will was made in 1675, the Deed in 1681; and shall take notice (as I find there was much use made of it on one side) of what the Expressions are in the Will, and somewhat of what Deficiencies there were of Expression in this Deed.

The Case.

In 1675 the Duke of Albemarle made his Will; and by that Will he declares, That in respect of my Lord of Bath's being one of his nearest Kindred, and out of Gratitude due to him for many Acts of Friendship and good Offices done to him and his Family, his Will was that he should inherit all the Parts of the Real Estate not therein otherwise disposed of; and therein he desires the King to grant to the

the Earl of Bath, and the Issue Male of his Body, the Title of Duke of Albemarle; and that his Eldest Son might bear the Title of Lord Monk: And this was intended in Trust to pay all his Debts and certain Legacies in the Will. He therein gives a Legacy of 1000 l. to Henry Monk (not the Father of the Plaintiffs the Monks) who it doth not appear was any ways related to him.

Six Years after, in 1611, this Duke Christopher makes a Deed, and in that Deed recites this Will true as to the Date, but mistakes it in several Particulars. This Deed settles the main Part of the Estate after the Duke and Dutchess their Death, without Issue by the Duke, upon my Lord of Bath, part of it immediately after his own Death, without Issue, other parts upon Sir Walter Clarges, and Mr. Greenville: And it has been observed, that almost all the Limitations of the Estates in the Deed differ from those in the Will, at least in express Terms, if not in very Substance.

This Deed also sets forth the Grounds why the Duke made it, and it is to this effect. He doth declare he was so unfortunate, that his next Heir at Law was descended from a Regicide, and therefore I would observe it was not only to confirm the Will, as they would have it, but for preventing so dishonourable a Descent of the Estate which he owed to the Bounty of the Crown, and for conveying and settling, and assuring the Lands to the Uses therein after declared, and confirming and corroborating that Will which he did not intend to revoke, and to prevent any Claim either by the Heir, or any pretended surreptitious Will which might be obtained from him by Surprise: These are the Considerations and Reasons expressed in the Deed, why he gives this Estate away from his Heir at Law.

Both this Deed and Will agree in this for Substance, that they limit the main part of the Estate to the Earl of Bath, tho' they differ in several of the Limitations to diverse Persons: And as to some of the Limitations to the Earl of Bath, they differ too; whether material or no, shall be considered by and by.

There is in this Deed a Proviso, which makes the great Question in this Case, that the Duke should have Power to revoke any of the Uses in the Deed, and limit new ones: But this Power is restrained by several Circumstances; it must be by writing under his Hand and Seal, in the Presence of Six Witnesses, three whereof to be Peers of this Realm, and a tender of Six Pence to the Trustees named in the Deed.

Afterwards, in the Year 1687, the Duke makes another Will, and thereby he giveth some Parcels of his Land to Mr. Bernard Greenville my Lord of Bath's Brother, Sir Walter Clarges, and others, and makes some larger Provision for the Dutchess for her Life than he had before; but the main Bulk and Residue of the Estate, is by this Will given to Col. Thomas Monk Father of the Plaintiffs; and he doth likewise in that Will make a Petition to the King, that he will be pleased to confer a Title of Honour upon him, and
make

make him Baron Monk of Potheridge, the Ancient Seat of the Family.

That Will of 75, and the Deed of 81, are subscribed by six Witnesses each, this Will of 87, but by three; and so the Defect of this Will to make it a Revocation is, that there are but three Witnesses, and none of them Peers, and there was no tender of 6 d. to the Trustees.

The Intent
of the Cross
Bills.

The Intent of the Earl's Bill is, to have an Establishment of this Deed against this last Will; and the Intent of the Dutches and Mr. Monk's Bill is, to set aside the Deed, and establish this last Will and that upon certain Grounds of Equity, the Deed having obtained a Verdict for it at Law.

This is the General State of the Case, the Particulars will be brought in best under the several Heads that I shall mention: But first I shall take notice, as I go, what Progress this Cause has had since it was first in agitation.

Particular
Considerations
in the
Case.

First, It was insisted, that this Deed was a false Deed, and that was thought fit to be directed to a Tryal at Law; and it was most proper it should be so; for it concerned a great Inheritance and Freehold conveyed by Deed, and a Devise, both Titles at Law, and that was fit to be decided in the proper Judicature for such things, in a Court of Common Law by a Jury. Accordingly, this Tryal was directed in an Ejectment at the King's Bench Bar; and this Court so far aided the Parties to come to the proper Question, as to order there should no Incumbrances stand in the way, or be insisted upon, but any thing that obstructed the trouble of the right should be set aside: So that in short the Validity of this Deed was the thing directed to be tried; it was accordingly tried, and thereupon a Verdict obtained that the Deed was a good Deed, and the Earl of Bath's Title under it, good at Law; and Judgment was afterwards entered up; and that for the Defendant's part was not exclusive: If there had been any Misdemeanour on the other side, or in the Jury, they might have had redress by applying to this Court for a new Tryal; nay, they may try it again when they please, upon a new Ejectment: But they have acquiesced under it to this Day, that is to say, now for two Years together: So that we must take it for granted (at least this Court is, I conceive, bound by it) that it is a true Deed, and a good Conveyance of the Estate, as much Evidence there is of it as is possible: so strong an Evidence, that we must take it to be a true and a good Deed, and a Deed without Suspicion: Twelve Men, besides the Witnesses to it, have sworn the Validity of it, (that being the sole Question before them) and this must be remembered all along in the Consideration of this Case.

Indeed the Counsel on the other side did seem to speak a little slightly of it, as upon a doubtful Evidence; and at last, that it is true by this Verdict they must admit that this Deed was sealed by the Duke, tho' that was not a little controverted before: But in truth, here is the Right tried; it was a Deed that was a Conveyance of the

the Estate, and now we must take it for granted that the whole of the Deed was tryed and confirmed by the Verdict; so that it is a good Conveyance at Law, and passeth all that the Words can carry. And therefore, in our Consideration of this Case, we must lay aside all the Evidences that was, or was properly to have been given at the Tryal, as to the truth and validity of the Deed: And I, for my part, can allow my self no Consideration of this Deed in speaking to it, but such as are Considerations of Equity, consistent with the Truth of the Deed.

A Deed try'd and confirm'd by a Verdict, passeth all that the Words can carry; and the Validity not to be question'd.

And that is now the only thing that is to be applied unto, what there is in Equity, and Conscience, why this Deed should be set aside when it is allowed to be good in Law; there is no doubt but there may be good ground, in some Cases in Equity, to set aside that which is good at Law. But the Question is, whether in this Case there be any such or no?

But before I proceed to the Consideration of what has been insisted upon in that kind, I desire to take notice of something about the Will of 87. I am very well satisfied that that Will is well proved: There is my Lord Chief Justice Pollexfen hath proved the Instructions given for the preparing it, and the drawing of it; and there are Three Witnesses that speak to the Publication: And this is confirm'd by the Testimony of Sir Robert Clayton, who transacted the first part of that Affair, to bring the Duke and my Lord Chief Justice together: And I do equally reject all the Evidence on the one side and the other, against the Truth of either the Deed or this Will.

Then this Will would have been a good Disposition of the Lands, if the Law did not hinder; this is, if this Deed did not stand in the way, as a prior disposition, and found good in Law; so the Deed is good, if Equity do not hinder it. Now the grounds of Equity which my Lord Mountague's Counsel insist upon, are I think these: I have made indeed four of them, but in substance I do not differ from my Brother Powel about them, for I comprehend that the Deeds being ancillary, as it was called, and attendant upon the Will, under the head of a Revocation in Equity; I say the heads of Equity insisted upon, to set aside this Deed, are Four.

The heads of Equity in this Case.

First, Surprise and Circumvention in obtaining of it, and that relates to the Creation of it. 1.

Secondly, Concealment from the Duke, and this by my Lord of Bath, and so he was not informed how his Power was circumstanced, and therefore not able to execute his Power according to the Circumstances, which makes it become a fraudulent Deed, and for that Cause the Plaintiffs shall have relief against it. 2.

Thirdly, There is a Revocation in Equity, tho' it be not in all points such as would be sufficient in Law, yet there is so much done towards it, such a Solemnity in the Act done, and such an Impediment of doing more, as will amount to an equitable Revocation. 3.

The Fourth head is that which was mentioned of the trust in the deed. 4.

As to the first Point of Surprise, it was a head much laboured by the Case, on the Plaintiffs side, and yet I confess I am still at a Loss, the first.

Ans. to the first.

Surprise,
what, and
how confi-
dered in Law,
and Equity.

for the very Notion of Surprise, for I take it to be either Falshood or Forgery, that is, tho' I take it they would not use the Word, in this Case, Fraud; if that be not the meaning of it, to be something done suddenly and unawares, not with all the Precaution and Deliberation as possibly a Deed may be done.

Here was a Case cited not long ago, in another great Case in this Court, out of the Civil Law, about Surprise, but that was under another Head: That is, A Man was informed by his Kinsman that his Son was dead, and so got him to settle his Estate upon him: This is called in the Civil Law, Surreptio. I know not whether that Word will answer those Gentlemens Notions about this Matter. Now the Civilians define that thus, Surreptio est cum per falsam rei narrationem aliquod extorquetur; when a Man will by false suggestions prevail upon another to do that which otherwise he would not have done.

And I make no doubt but Equity ought to set aside that, but then this is properly called Fraud, and that must be made out, it can never be intended, I find not any such thing pretended to be made out, that my Lord of Bath did use any false Suggestions to the Duke, or Informations at all, for what appears in the Proof; I beg pardon if I mistake or forget any thing of the Proof.

Then here is Matter of a Surprise objected, which must be something that will not avoid this Deed at Law, but will avoid a Deed in Equity, which yet is not direct Fraud or Falshood in the Party, but is to be gathered out of the particular Circumstances of the Case; but what in certain to make of it I confess I cannot tell.

I would repeat the Words that the Plaintiffs Counsel used: They say it is absurdly drawn, it was unduly put upon the Duke, 'twas done without his perusing it; it was contrary to his common Intention, before and after the Sealing of it. It must be admitted that there was Deliberation, and Consideration, and Intention enough proved to make it a good Deed at Law, otherwise there would not have been a Verdict for it: But it should seem there was not enough of these in Equity, and the want of this is what they call Surprise, and that must avoid this Deed in Equity.

But I confess I am not satisfied that there was any Surprise in this Case in any thing: The Duke at the time of making this Deed was under no Force, no Restraint, no False Information, as I observe, no nor any Solicitation from my Lord of Bath at all: He was in his own House at his full Liberty, he was in very good Company; for I take it for granted, (as I shall insist further by and by) that Sir William Jones was by at the Execution of this Deed, and a Witness to it; the Duke was under no Sicknes, no Weakness: And I must take notice of one Proof more which was mentioned, he had not been drinking. but was in very sober Company. This appears to be the Condition in which the Duke was at the sealing of the Deed in question.

But let us consider what are the Particulars of Surprize, that they who oppose this Deed insist upon; I think they are reducible to these Three. There was a Want of Collateral Circumstances that use to attend the Execution of Deeds, made with good Deliberation, and without Surprize: Then there are some Observations made upon the wording of this Deed, which argue a Surprize: And then they say it must be obtained surreptitiously, because it is contrary to his constant Intention and all the Course of his Actions as well before as after that time.

First they say there is a want of Collateral Circumstances that are to attend the Executions of Deeds made with good Deliberation, and without Surprize, and that appears in these Particulars.

First, It doth not appear who drew this Deed: It is certain, they say, that it could not be Sir William Jones, and I think so too: They observe, and with very good Reason, that he saying, I approve of this Proviso, doth prove that he did only concern himself with the Proviso and did apply himself singly to that, and did not manage the Body of the Deed.

Then it doth not appear that the Draught of this Deed was read, or the Deed subsigned, or countersigned by Counsel, as was the Duke's usual Method; nor was there any Counterpart of the Deed: Whereas to the Will of 87, it was carefully drawn and made, and three parts of it prepared, and then there were very great Persons concerned as Trustees in this Deed, and yet several of them knew nothing of it.

To this I must acknowledge, that the Objection is for the most part true; but how far it is an Objection we shall consider further by and by.

First, for the want of Instructions about the drawing this Deed, this is now above ten Years before it comes in question; and such Instructions there might have been, but in length of time lost or laid aside; and when once a Deed is actually made, great Persons, as well as lesser ones, are careless of the Preparations of such Deeds: The Deed binds the Estate, and if that be carefully kept, there may easily be a Negligence as to the rest.

I did observe before, that tho' the particular Limitations in the first Will and this Deed do differ, yet both Deed and Will do agree in Substance to settle the Bulk of the Estate to my Lord of Bath. It is likewise observable, that there is a strong Proof Sir Thomas Stringer drew this Deed, for his Hand is interlin'd in every Sheet of the Draught; and as I do remember his Son writ it. Sir Thomas Stringer was at that time my Lord Duke's Counsel; and I confess there have been reported several things about this Matter from his Mouth, which because they are very various and inconsistent, I wish he had been alive, that he might have set all right; but as the Matter now stands here, it has rendred him very doubtful in the Case.

I con-

I confess I do believe Sir William Jones had too little Patience (give me leave to say so) and too much Skill to make such a Deed; I speak as to the Art and Skill of framing it; therefore I conceive he did not, but Sir Thomas Stringer did.

As to the not reading of the Deed to the Duke, which the Defendants Counsel do object, neither was the Will of 87 read to the Duke at the time of his sealing and publishing it: So far it is true, that after it was ingrossed and brought to Sir Robert Clayton's, it was not read to the Duke; but the Particulars of it he had been acquainted with at the time of the drawing, and so it might be as to the Deed too, for any thing appears to the contrary.

That there was no Counterpart, and that the Trustees were not acquainted with it: The Answer is, That the Duke did intend it as a Secret, and therefore the less notice was to be taken of it; and the Duke intending mainly by it an Advantage to my Lord of Bath, it was thought fit to be concealed, for some Reasons, from the Dutches.

But after all, I know no such Rule in Equity; I am sure none of the Precedents that I have seen come near it; that where there is a Deed for the making of which no Instructions are found, no Proof of its being read to the Party at its Execution, no Counterpart, or the Trustees not acquainted with it, that these are sufficient Grounds to set such a Deed aside in Equity: I do not think any of the Precedents, or all of them together (and I am sure I have read them all) will amount to prove any such thing.

The second Matter to make out the Surprize, is some Considerations taken out of the Bowels of the Deed it self, several Improperities of Expression, as (in part of Dower) and (in full of Dower) which are not Phrases that look like the Act of a Lawyer, one well skilled in the property of the Law-Dialect: It doth also misrecite the Will of 75, that is particularly, as to the Lands given to the Dutches, that they are given for Life, when it was only during her Widowhood: The Lands are said to be given to Mr. Greenville as if he were immediate Devisee, whereas it is a Devise to him in Remainder after a Limitation to the Duke in tail.

Improperities of Expression, and Misrecitals, are too slight Acts to avoid Deeds, which are well proved.

But certainly Improperities of Expressions and Misrecitals in Deeds, are too slight Acts to avoid Deeds so made, so attested, so proved, as this Deed in question has been: They are rather indeed flaws and Objections that go to the manner and form, than the substance, and shew rather want of Art in the Counsel that drew it, than want of Honesty and Integrity in the Deed it self: Besides that, a Devise to one for her Widowhood, is a Devise for Life in one sense, and Common Parlante, tho' it be defeasible; and a Devise to one in Remainder, is a Devise to him, tho' not an immediate one.

Another Observation out of the Deed it self is, that here are Estates limited to the Duke's younger Sons out of Lands which he had no Power to create or carve such Estates out of, they being settled before upon his Marriage on the Eldest Son; and that is true; it is so,

as to the Lands called Norton Disney: But there are other Lands not comprized in the Settlement, and all the rest that were new Purchased, were in his Power to settle as he pleased.

But the great Objection out of the Deed is this, That this Deed doth in several Places declare it self to be made to confirm and corroborate the Will in 75. How comes it then to pass, that it should differ from it in all the Limitations, except one? And that is in the Draught of my Lord of Bath's own writing; and that part of the Estate is by the Deed to come to the Lord of Bath, upon failure of the Duke's Issue Male only, so that his Daughters are wholly debarred.

To this I say, what they object, (that there is rather a Contradiction than a Confirmation of the Will) is true; I am not satisfied I assure you in that which the Defendants say to it, that the Will is mentioned only, as to preventing the Descent. It is first mention'd there, but I think it goes through, and is repeated more than once; but that which I would observe, is this, that this Deed does confirm the Will in the main and substantial part of it, the settling the Bulk of the Estate upon my Lord of Bath.

Besides, the Expression of the Deed is not only for confirming the Will in 75, but also to the settling of the Lands to the Uses after declared; and if it do not confirm every Limitation, yet it doth in the substantial Settlement of the Estate.

It was further said, that the only Limitation which agrees with the Will, is that which is in the Draught of my Lord of Bath's Hand-writing, where Lands are limited to my Lord of Bath, after failure of Issue Male with Exclusion of the Daughters, which, the Plaintiffs say, it can not possibly be imagined the Duke ever intended to do. But I must mention what Answer the Defendants give to it: They say the Duke had then 15000 l. a Year: and he makes an Intercession to the King to bestow the Honour of Albemarle upon the Earl of Bath; and that it might not go alone, he limits 3000 l. a Year upon his failing of Issue Male; so that the Honour should come to the Earl, and there was enough left for Daughters. Now if their Valuation of the Duke's Estate be right (which truly I know not) it is some Answer why some part should be given to the Earl only after the failure of Issue Male.

But then I would observe too, the Deed by this Obligation doth confirm the Will of 75, and that Will also affirms the Deed: If the Will of 75 were once well, as I see no Colour to the contrary, then I am sure all these Objections from the Duke's contrary Intentions are all answered, that he never intended to give him his Estate, for if they admit that the Will was once the true Will of the Duke of Albemarle, then there was an apparent Intention in the Duke of Albemarle to give the Earl of Bath the Bulk of his Estate if he died without Issue.

Now as to the Variations in the Limitations of the Deed from those in the Will, I think truly it stands indifferent to one side or other. For here was the Distance of six Years between them, and the Duke might alter his Mind; it might be one way one time, and another time another; he might alter his Mind as to his Daughters, he might alter so many Years despair of Issue; and so not mind the making any Provision for them, he might change his Mind as to his other Kindred, and therefore might in these Particulars vary from the Will of 75.

But I would still have this observed, that in Substance they do agree; he doth preserve the same Favour and good Intention for my Lord of Bath to give him his Estate as his nearest Kinsman: If then these Limitations in the Deed were pursuant and agreeable to the Duke's then Mind, it is no Matter if there be any such Variations or Alterations from what was in the Will; and that it was agreeable to his Mind then, I shall by and by take notice of some things that occur in this Case, and which seem to satisfy me in it that this was his Intent. For I did observe, that one thing they insisted upon, to shew it was by Surprise, was, that this was contrary to the Intentions of both the Dukes of Albemarle, and the constant Series of Purposes in the Family, and they undertake to give Instances of it.

The Defendants Counsel say, That his Intention was to give his Estate to the Earl of Bath, who was his near Kinsman; to whom he had very great Obligations; that my Lord of Bath was concern'd in that great Action of Restoring the Royal Family, which was the Raising of his own; that he was a constant Friend of Duke George, and his Son's chief Counsellor and Adviser; and that the Family were under great Obligations, is and must be admitted both from what is in the Deed expressed, and what is otherwise proved.

The
Plaintiffs
Suggesti-
ons,

But the Plaintiffs say no, they had no such Intention, neither one or other of them, and particularly Duke Christopher had none, neither before the making of this Deed nor after. Duke George makes his Will in June 1665, wherein he gives all his Real and Personal Estate to his Son, and nothing at all to my Lord of Bath. I did look into the Will, which is very short, and there is nothing given to any body but his Son, that is the whole of the Will; then in the Year 1669 is the Settlement made by Duke George upon his Son's Marriage, and there is nothing settled upon my Lord of Bath, not so much as a remote Remainder. In 73 Duke Christopher makes his Will, and therein gives great Legacies to the Dutchess, but not to the Earl of Bath.

These are Instances before this Will and Deed, but the Answers given them are these, which makes me not satisfied with the Plaintiffs Objections or Proofs of his never intending to give my Lord of Bath his Estate.

First, as I said, Duke George's Will is very short, and takes notice of no body but his Son; and as he gives nothing in it to my Lord of Bath, so neither doth he to any body else, and that very Devise is void, because it was to the Son and Heir, to whom it would without that have descended; and it signifies very little to their purpose, being in the same Year with King Charles's Sign-Manual at his Request to promise the Earl the Dukedom upon failure of Issue Male.

As to the Marriage-Settlement in 1669, there is indeed nothing settled on the Earl of Bath, so much as in Remainder; but in such Settlements Men usually do provide only for the Issue of that Marriage, and so leave the Disposition of Remainders to subsequent Settlements.

As to the Will of Duke Christopher in 1673, at that time they say he was but a Minor of twenty Years of age, and it was only to dispose of his Personal Estate; for as to his Lands, if he had made any Devise of them, it had been void, and the Personal Estate was at that time about 60000 l. But within a Year or two after that, when he came of Age, is the Will of 75 made, and there is a mighty liberal Gift made to my Lord of Bath; and pursuant to his Father's Desire, and King Charles his Privy Seal, doth he make that Request for the Dukedom for my Lord of Bath. And it must be observed, upon all these things, that as there is nothing given to my Lord of Bath in Duke George's Will and Settlement, nor in Duke Christopher's Will in 1673; so nor is there any Lands in either of them, nor in the Will of 1675, or Deed of 81, given to Thomas Monk the Father of the now Plaintiffs; so that that Objection is much stronger against them than against my Lord of Bath.

Now I do not find any Proof of a Provocation or Cause given by my Lord of Bath, to make the Duke totally change from this Intention, to give him the greatest part of his Estate, and put him quite out of his Favour, nor doth it appear he was so; here were several Letters read, there have been Copies of them brought us, and I have looked upon them; against these Letters it has been observed, that "here is no notice taken in any of them of this Deed, but there is some of the Will of 1687, while the Duke was in Jamaica about the Death of Colonel Monk.

I confess, I cannot say there is any one Letter that speaks of this Deed, by the Name of a Deed; but there is one or two that have an Aspect upon it, and very near respect unto it, and cannot refer to any thing else, particularly that which was written relating to my Lord Lansdown, when he was going to travel, and another about his Marriage, wherein he takes notice how much he was concerned in him, even next to his Father himself, as he very well knew; and that he wrote so much about him for Reasons best known to the Earl himself; this seems to

to point at the same Conveyance, and aims at this Deed, to my thinking, directly.

They have made another Objection, that the Duke never intended to leave any part of his Estate to Sir Thomas Clarges, because he was under the Duke's Displeasure, upon account of something he took ill from him, but that receives an easie Answer; what is limited to him is but a Remainder, and that of no great Estate neither; besides that, the Evidence of the Duke's being displeased with Sir Thomas, is but a hearing by a third hand; but I find no displeasure proved at all that was conceived by the Duke against my Lord of Bath to the last: Come we then to the Time of making this Deed, and let us see whether the Duke did really intend what the Words of this Deed do import, and that I think is made evident by Proofs that have not been answered or contradicted; The Deed takes notice of the very great and many Acts of Friendship and Kindness received by him and by his Family from my Lord of Bath; and it is proved, the Duke declared it ought never to be forgotten, nor could he ever make him sufficient amends. It should seem he had procured his Father's Garter for him, when he might have had it himself; he thereupon tells Mr. Prideaux that he was settling or had settled his Estate upon my Lord of Bath, which must be much about the same time that this Deed was made. One of the Witnesses to the Deed says, at the sealing of it he wished he could have done more for him.

But to me, one of the clearest Evidences of the Duke's Intention to do this for my Lord of Bath, and that it was no surprize upon him, is the Presence of Sir William Jones at the Execution of this Deed; for I do take it upon the Proofs, it is most evident that he was then present; and I will tell you what the Evidence of it is: Mr. Vivian says, he was often used as Counsel for the Duke of Albemarle, and principally relied upon; and this Vivian happens to be one of the subscribing Witnesses, and he positively says, Sir William Jones was there, and a Witness to the Deed; so says Mr. Strode, who knew him very well; and the Third says, there was a great Lawyer there, though he doth not pretend to know him, it is Clark: Mr. Hebblethwait says he believes the Name indorsed is Sir William's Hand-writing, and no better Witness could there possibly be for that purpose than he; nor could there be greater Evidence than those Multitudes of Instruments that were produced in Court, whereby to my Apprehension it did appear plainly that the Characters did very well agree.

Now if Sir William Jones was there at the sealing of this Deed, I think I need say no more upon this Point; he was a Gentleman very well known to be both of great Ability and Integrity, and Reputation; and he would never have given up all his Honour and Reputation, and the Quiet of his own Conscience, to make one in a Confederacy of circumventing this Noble Duke, or defrauding any one of his Estate, and therefore believing him

him first to be present which I really do, I cannot but conclude that it was really and bona fide done without fraud or Surprize. Besides this Evidence, there are several discourses also that have been proved, wherein the Duke hath declared both his intention, and that the thing was done, which sheweth he was not surprized into it, I name Mr. Crofts in particular, who must be admitted to be a good Witness, being one of the three Witnesses to the Will of 1687: And he says the Duke of Albemarle told him the Earl of Bath was to succeed to his Estate.

It is indeed objected upon this Head, what needed then all this Objection Privacy be used? why should the Duke conceal it from the Dutchess his Lady, to whom he had been so kind in it? why from the Duke of Newcastle and the other Trustees, Persons of Quality and Honour? They say it could not be for any dissatisfaction the Duke had with his Dutchess, for they always agreed very well together, and they have read the Testimony of my Lord Carmarthen, who says that he never observed a Couple to live better together, or any Woman to carry it better towards a Husband than the Dutchess, and they have produced you some Letters from the Duke to her which shew great Fondness and Affection to her.

Truly in the first place I do not know why any Reason should Answer. be expected to be given why he useth Privacy in any Action he doth, sure he may or he may not at his Pleasure; there may be private Circumstances that may induce him (and that with very good Reason) to use more or less Privacy in the Affairs he transacts. But besides this they bring you in Proofs that I cannot but mention, that the Dutchess had conceived a displeasure, though it be not known for what Reason, against the Earl of Bath; that the Duke was uneasy under her Importunities to do what he had no mind to, and that was the Cause of his drinking so hard to divert himself; the Duke was apprehensive she would pursue her displeasure against my Lord, and he would have but an unquiet Life if she came to the Knowledge of this Settlement, at least till she had prevailed with him to alter it, which he resolved not to do.

Now it may be (I speak it with all the due Respect to my Lord Carmarthen's Evidence) that the publick Carriage might be plausible, especially in the Presence of one of his Quality, and yet there might be some latent displeasure which might break out amongst themselves whenever my Lord of Bath came in competition with those for whom my Lady Dutchess had more Affection, and would make use of her Interest in the Duke about it, and the Council for the Plaintiffs could very hardly maintain but that the Duke had once an Intention that my Lord of Bath should have his Estate, till, say they, he came to have the Knowledge of one of his own Name whom he designed to prefer and provide for.

If so, then I am sure the first time that any such Change of Mind doth appear, is by this Will of 87; for before that they do not pretend to any thing done for Colonel Monk, and that will serve to answer that Objection that this Deed of 1681 was against the Duke's constant Intent before and at that time.

It is true, he doth call Colonel Monk Cousin in this Will of 1687: Whether he was a-kin to him or no, doth not appear in Proof at all in the Case, but on the contrary it is in Proof that my Lord of Bath is really near a-kin to him; and it was as much his Intent when he made this Deed to keep up his Title and Honour in my Lord of Bath's Family, as can be imagined or conceived.

Objection

As to the Will of 1687, that doth declare his last Intention, and that they say is most probable, that my Lord of Bath should not have the Estate, but Colonel Monk should; for it was a Will made with great deliberation, being five or six Months preparing, great Advice about the drawing of it taken, particular Instructions by himself given, several Copies made and left with several People. On the other side they observe the distance of Time, six Months between the Preparation and Execution, which is not an Argument that he was very forward to do it; but rather an Argument that he was very unwilling to do it, and the very time of executing it was when he was very uneasy about his being forced to execute the Conveyances of Dalby and Broughton to my Lord Jefferies; his Mind was then disturbed; but if he had a real Intention and Purpose to Revoke the Deed, he had an Opportunity to get this Revocation done in their Presence, and afterwards he might easily have got a third Peer.

Answer.

The great Objection is, what should the Duke take all this Pains for, and this Care and Thought about the Preparations for this Will, so carefully execute it, deliver the several Parts to several Persons, and all for nothing? I do admit it is a great Objection, and I think there is but one Answer to it, but that is a pretty plain and strong one: Why was all that Care and Thought used about the Will of 1675, and the Deed of 81? did he intend nothing by it then? and if he did then intend something, what Provocation, what Demerit, what was done or left undone by my Lord of Bath to change the Duke's Mind, that whereas before he gave him all his Estate, now he should give him never a Farthing? truly I think it was the Duke's Intent to do this last Act only for his own Ease; he knew the Dutchess had a displeasure to my Lord of Bath, and therefore he himself designing to express his Kindness to my Lord of Bath, would make such a Deed, and put it out of his own Power to alter it upon any slight Attempts, or unless he should have reason to change his mind towards him upon extraordinary Occasions and Circumstances; so by not complying with these extraordinary Terms in the Power, he could preserve his Purpose towards my Lord of

of Bath, notwithstanding any Attacks upon him. and yet by such a Will as this he could pacify the Importunities of the Dutcheſs, who not knowing of the Deed, did acquieſce in a Settlement by Will, ſo Things might paſs eaſily, and he not being diſturbed by any Bickerings or Miſunderſtandings between the Dutcheſs and my Lord of Bath.

And truly it appears by what Doct^r Benwick ſaith, that the Duke was to buy his Peace at home by ſuch a Compliance, for he was told the Dutcheſs would be very bad as to her diſtemper if her deſires were not answered; and in Jamaica there is Proof of a very great Uneaſineſs the Duke was under, the Chamber was lock'd up, and Perſons that came to him were forced to come in at the Windows. I have been long upon this Head of Surprize, becauſe it was ſo much laboured by the Council for the Plaintiffs; but after all this I think it is but a ſhort Point; here is a Deed made in 81, fully proved and found to be a good and true Deed by a Verdict at Law, and as ſuch, is a good and ſufficient Conveyance of the Land at Law: And that is made to my Lord of Bath purſuant (as to the Ground and Subſtance of it) to the Will in 75; though all the particular Limitations do not agree; here is no Fraud, no Falſehood proved, no Pradice that appears at all upon the Duke to obtain it. But here is the want of a Counterpart and want of notice to the Truſtees, and theſe muſt be Matters to make out a Surprize to ſet aſide this Deed.

Want of a Counterpart, and want of notice to the Truſtees, no Cauſe to ſet aſide a Deed in Equity.

I confeſs I am at a very great Loſs upon what Ground of Reaſon that Rule is founded, and am totally to ſeek for a Precedent to be guided by in the Caſe, and therefore I cannot but be of Opinion that it cannot be ſet aſide in a Court of Equity upon that Point.

The next thing is that of Concealment; they ſay that this Deed was ſecreted and concealed by my Lord of Bath from the Duke of Albemarle, that he might not know the particular Circumſtances of his Power ſo as to purſue them when he had a purpoſe to execute it; and this they ground upon a Matter of Fa^{ct}, which they ſay is teſtified by one of the Witneſſes to the Deed; that the Deed at the time of the Execution was delivered to the Earl of Bath. and ſo they ſay it was kept by him, and the Particulars of the Power were forgot by the Duke, and ſo he was not informed what he ought to do nor enabled to make a preſent Revocation.

The 2d Head, and Answer.

They ſay, likewise this Deed was concealed and not diſcovered upon the Sale of Part of the Eſtate conveyed in it to my Lord Jefferies, and Leases and Annuities. But that which they inſiſt upon (as I by my Notes take it) is a Paſſage in my Lord of Bath's Answer to their Bill, that about the Year 1686 my Lord Duke ſent to the Earl for his Will, in order to make a new Settlement of his Eſtate, and this was juſt before he made the Will of 87.

Now truly I think it may have this ſhort and plain Answer; the Duke, if he had a mind to Revoke this Settlement, had more need

need of the Deed than the Will, he might Revoke the Will without looking into it, by making a Subsequent Will; but he could not Revoke the Deed, because he was by the Proviso circumscribed to the Observance of such and such Circumstances; say they those Circumstances the Duke might be apt enough to forget, and then when he knew the Duke's Purpose to alter the Settlement of his Estate, my Lord of Bath should have been so ingenious as to have sent the Deed, or have acquainted him with the Purport of it, and should have considered that the Duke did mostly need that to effect his Purpose, more than the Will to Revoke, that he might observe the Statutes of Frauds and Perjuries, required by three Witnesses to make a good disposition of Lands by a Will, and without much ado that might be complied with: But yet all the while this Power not being observed, all his Counsel, by subtle Advice, told him would signify nothing, therefore he would not discover that, and not doing it, it must be a fraudulent Concealment in him sufficient to set aside this Deed.

They say, it is no Objection, that this was not a fraudulent Conveyance in its Creation, for every Man shall be relieved against that which being by Fraud concealed from him, he could not make such reasonable Provision against as, if he had known of it, he might have done. Truly I do think this is the best Ground of Equity that has as yet been offered in this Case, and were it not grounded upon Facts, which in truth upon the Proofs are quite otherwise, I should think it were a good Ground for Relief, for wheresoever a Man doth endeavour to inform himself of the Circumstances of his own Power and Condition in order to Revoke such a Settlement, where he has a Power so to do, and is hindered from coming at the knowledge of them, and especially by that Person whose Interest is to prevent a Revocation, he ought to be Relieved in such Case; for it is against good Conscience that any Man should profit by any such subtle sinister Practices; therefore I say the Objection were good, if the Fact were true?

Where a man endeavours to inform himself of his own Power in order to revoke a Settlement, and is hindered from coming to the knowledge thereof, he ought to be relieved.

But alas it is founded in this Case upon Presumption merely: It doth not appear that the Duke was desirous or needed to be informed at all in the Matter, or that he did really intend a Revocation, we do not hear any Proof that he did ask or speak to any Counsel about it; nor is it true in Fact that the Duke should expect the Deed out of my Lord of Bath's hands, nor indeed could he expect any such thing, for I take it, it stands plain in Proof thus:

My Lord of Bath says in his Answer, that the Deed was delivered to, and kept by the Duke; they say that Answer of his, being a Defendant, is not to be regarded, for it is replied to generally, and so the Facts not acknowledged any further than they are proved. But to that I say, the Plaintiff must prove that

this Deed was in my Lord of Bath's Hands; they say Aleman proves it, who says it was deliver'd into the Earl's Hands: This was looked upon as so material a Point in this Case, that the Deposition was called for to be reviewed; and upon reading it again, it was plain it must be understood of the Delivery of the Deed only to execute it and make it a good Deed, not a delivery into his Custody.

Now, there is a farther strong Evidence, that it was in my Lord Duke's Hands, and not in my Lord Bath's; for Sir Tho. Stringer doth a little before the Duke went beyond Sea, make an Abstract of it, and delivers it to his Man to make a Copy of; and then after the Duke's death both Deed and Will were produced under one Cover, (but it is plain the Will was delivered to the Duke.) This answers it, and agreeth to what my Lord of Bath saith in his Answer, that they were both delivered to him by the Duke a little before his going to Jamaica, under that Cover, and sealed with the Duke's own Seal, and so they are found. And truly if it were but doubtful, whether it were in the one Hand or the other, we must not determine that it was in my Lord of Bath's Hands, or convict him or any Man of Fraud where the Evidence is doubtful, it ought to be proved, and plainly proved; for Fraud is a thing odious, and never to be intended or presumed.

Fraud is a thing odious, and never to be intended, or presumed, but plainly proved.

But the Truth was, this Deed was concealed not from the Duke, but from the Dutcheſs, that she or her Council should not get at it to procure a Revocation.

As for the Case of Charles Clare that was mentioned, it doth not in any sort come up to this Case; he had lent Money upon a Statute, afterwards Money is lent upon a Mortgage of the Lands liable to that Statute; he ingrosseth the Mortgage, and never discovereth the Statute, the Lands were not worth more than the Mortgage-Money; and by reason of this Concealment, it was adjudged Fraud in him, and he should have no Benefit of his Statute against the Mortgage. Here was a Knowledge proved in the Case, which is not in my Lord of Bath's, that the Duke would revoke; and yet I must needs say, and I appeal to those Gentlemen that usually attend at this Bar, whether they did not think it a hard Case.

Clare's Case.

And as to the Case of Raw and Pott, besides that it was a Case between a Younger and an Elder Brother, and so might have a better Ground or Handle for Equity, yet I think it was justly decreed, because the Party knew it and concealed it on purpose, and encouraged the thing: For when he was asked, why he did not discover it? then he answered, If he had, then there would have been a Fine levied, and a Recovery suffered, and then he knew all would have been well enough; but there is no such Matter as Knowledge, or the like, here.

The next Head of Objections is that of a Revocation in Equity; and for that the first thing insisted upon is this; they would have the Deed of 81 to be depending upon the Will of 75, it was ancillary, it leaned upon it, and therefore this Will of 87 revoking

The 3d Head and Answer.

A Feoffment depending on a Will may be revoked by revoking the Will, tho' Livery of Seisin was made.

The like also of Uses limited in an Indenture, to the Intent to perform his Will.

In Revocations all Circumstances must be observed, or the Power not well executed.

Yet it seems where there is a deliberate Intent to make a new Settlement, and a Man goes as far as he can, Equity shall supply

the Will of 75, revokes likewise the Deed of 81: And for this they did cite two Cases out of Dyer, the first is fol. 49. 6. A Man makes a Feoffment to perform his last Will, and this Will is annexed to the Charter of Feoffment, and a Livery of Seisin is made; accordingly it was adjudged that he might alter and revoke that Will, tho' it took effect by the Livery; for that doth not alter the Nature of a Will, which is always revocable by the last Will; But doth that revoke the Deed too? No certainly, the Deed stood good; and there is nothing to the contrary appears in that Book.

The other Case is Dyer 314. 6. A Man by Deed indented declares, That whereas he had suffered a Common Recovery, to the intent to perform his Will, touching the Disposition of his Lands, he wills so and so; and whether he could, during his Life, alter the Uses in this Indenture, was the Question; and it is held he might: For this Indenture is Quasi a Will which is changeable: I will go further than that, I say it was a Will, or it was nothing; for tho' it were in Form of an Indenture between several Parties, yet when he says, he wills so and so, after he had recited a Power to declare by Will, this must be taken for a Will, or it is no Execution of the Power; for when a Man suffers a Recovery, or makes a Conveyance to me by his last Will, he hath two Interests in it; he may dispose of it as Owner, or by way of Direction: If he will dispose of it by way of Direction, as this was, he must follow the Method prescribed, and that must be by Will; and so this must be a Will, or no Execution of his Power. But what is that to this Purpose, that a Will, which a Deed is made to confirm, being revoked, that shall revoke the Deed too? Sure that is no Consequence, nor hath any Ground upon this Case.

But then, say they, here is a Revocation, and that a Revocation in Equity; for though it be a good Deed in Law, yet there is such a contrary Disposition by this Will, as must revoke it, being revocable according to the Power. Indeed here is not the Number of Witnesses required, nor the Quality, nor a Tender of the Money, and Powers of Revocation; for it is natural Equity, that he who is Owner of an Estate, should dispose of it as he pleaseth. But there is another Rule of Law that is as certain as any other, that all Circumstances must be observed, or the Power not well executed; and that is Scroop's Case, and other Cases that have been mentioned: And though the Law will go as far as it can to expound the Circumstances, as a Performance, yet a Performance is necessary.

The Foundation for this Revocation in Equity, which the Plaintiffs go upon, is this; where there is a deliberate Intent to make a new Settlement of the Estate, and a Man goeth as far as he can to make it, there Equity shall supply any Defect.

First, I must deny that in this Case the Duke of Albemarle hath done all that he could do; for he thought six Witnesses necessary to the Will of 1675, and six Witnesses to the Deed of 81, and so provides in this Power for Revocation, besides other Circumstances, and here are only three Witnesses to this last Will. Neither

Neither is this a proper Settlement of a Family, for it doth not appear that Mr. Monk, who is mainly taken care of in this last Will, was any Kin to the Family at all: Nay it should seem the Duke was not spontaneous about it, for he would have the Dutchess pay the Councils Fees as for her Business, when he came to execute it, it was not a Place that he came to for that Purpose, but upon quite another Affair; he would have put it off to another time; he would have avoided it, it was done in a hurry, and before Witnesses prepared for that very Occasion, and brought from Newcastle-House; and therefore it is not so much his Intent and firm last Purpose.

On the other hand they oppose this Argument thus; That the Duke did at the same time write to my Lord of Bath that his Purposes towards him were unalterable; and what his Meaning in that should be, unless his Purpose not to revoke this Deed and Settlement, truly I cannot tell: He left the Keys of all his Evidences with him when he went away; Crofts was ordered to deliver them to the Earl as chiefly concerned, if he should miscarry; he trusts him with the chief Management of his Affairs, directs him to be advised with upon all Occasions, as he used to do himself before, and so is the same still towards him in all Respects as ever he was.

I do not find in any of the Plaintiffs Proofs that there is any Cause shewn for altering this Mind of my Lord Duke's, if he had not himself declared it so to be unalterable; there was no Provocation on the one side, or increase of Merit on the other side, why he should change from his Kindness so grounded towards the nearest Relation of his Blood, to entertain a Stranger to whom he had never a Thought of giving any thing before; it is hard to think that my Lord of Bath, Sir Walter Clarges, Mr. Greenville, and even the Dutchess her self, should continue the same, and the Duke should not; I find no Evidence of it, nor can tell any Reason for it, and without Reason I cannot be induced to give my Opinion against a Deed really, deliberately, intentionally made, upon only the single Act of this Will, testifying so great and total a Change; surely if any such thing had been meant, it was strange he should take no notice of this solemn Will and Deed made before, and ask Advice whether it were not fit to revoke or look into it.

To my thinking, the Duke hath in effect declared, that this Will in 1687 should be taken for a Will as obtained by Surprize, for he binds himself by this Proviso only to revoke in such and such a way to prevent Surprize: We then find there a Will that wants these Circumstances required in the Proviso, and then we must take it to be what he intended to fence himself against; and nothing doth reconcile the Duke to himself in this Matter, but that he was apprehensive he should be drawn to do something that was against his Mind, and therefore he doth fence himself with this Proviso against all such Attempts.

The Will and the Deed do both provide largely for the Dutcheſs, but whether the Will doth it ſo liberally as the Deed doth, I cannot tell; they did talk as if there was 3 or 4000 l. difference: I cannot tell what as to the Value it may be; but I am ſure in this Will there is no Proviſion made for my Lord of Bath at all, and there is none for Mr. Monk in the Deed, or any other thing before this laſt Will.

Where there are two voluntary Conveyances, he that hath the Advantage at Law, ought to keep it.
* Caſes in Chancery, 1 Part, 138. and 1 Ventris, 199.

I muſt crave Leave to differ from the Council for the Plaintiff in what they take to be a Ground for a Revocation in Equity, that the Duke had forgotten this Deed; I am not ſatisfy'd that upon that Ground only this Court ſhould relieve againſt it: And my Reason is this; Suppose his Intention to revoke do appear, it ought to be in ſuch a manner as the Law requires, and purſuing ſuch Circumſtances as he has put upon himſelf, becauſe here is a voluntary Conveyance on both ſides; and where there are two voluntary Conveyances, he that hath the Advantage at Law ought to keep it. And ſo the Reſolution was in * Fry and Porter's Caſe: And I take it to be the ſtanding Rule in Equity; For what ſhall turn the Scale? Shall the Defendant urge any thing of Merit? That cannot be in this Caſe, but in the Eye of the Law they are both equal under the Conſideration of the Court, and in pari gradu; and indeed if it ſhould be otherwiſe, what would become of Circumſtances in Powers of Revocation, by which Men hackle and circumscribe themſelves with very good Reason at their Creation, if the laſt Will alone ſhall ſet aſide all?

Objection

It is Objected, That it was always the Duke's ſolemn Intent to prevent the diſhonourable Deſcent of his Eſtate upon his right Heir at Law, who ſprung from a Regicide, and to prevent a Surprize by a ſudden ſurreptitious Will; and both theſe Ends are attained by the ſolemn deliberate Preparation for his Will, and the Diſpoſition of his Eſtate to Mr. Monk, and it is ſubſtancially and therefore equitably performed, tho' not ſtrictly legally.

Answer.

I think there was a further End in this Deed, and that was to ſettle his Eſtate upon a Perſon of Honour nearly related to him in Blood; and this Court cannot take it from him without reflecting on this Settlement, and upon him that made it, and upon him for whom it was made; no, nor can it be done, as I take it, without performing the Circumſtances required and preſcribed for that Purpoſe in the Proviſo, without which I think this Court ought not to determine that the Intent is performed, or that his Mind is changed. And if we ſhall depart from theſe Limits, I cannot tell where we ſhall ſtop. I can ſet this as a good Limit; here is a voluntary Conveyance on the one ſide, and a voluntary Conveyance on the other ſide; the latter Conveyance muſt make it out, that the Circumſtances requiſite are performed, and if not, I think the Law muſt decide it; and there hath been nothing made out, by which, as I conceive, there can be any Advance given in a Court of Equity to determine it otherwiſe than the Law will.

I shall speak but very little to the other Head; It is objected and Fourth asked, whether there should be no Relief in any Case where there Head. is a Defect in the Execution of the Power. I think that would be very hard on the other side, and it would be convenient Relief should be given in these Cases.

First, for a Purchaser, I speak not now of a Purchaser for a valuable Consideration without Notice, for that is helped already by the Statute, and so where there is any Fraud, or the Party is guilty of any Deceit or Falsehood, whereby a Man is prevented from executing his Power, though he never so much intended or desired it.

In what Cases a defect in the execution of the Power may be relieved.

But there is no such thing here, and the Plaintiffs Counsel were wiser Men than down-right to call this Fraud, only they style it Surprise and Circumvention.

I think also it may be fit for this Court to give Relief where there is a foreign Consideration, as Consideration for Payment of Debts, or providing for younger Children; As where a Man makes a Conveyance or makes a Will, and chargeth his Lands over, when he has such a Power, for the Payment of his Debts, and the Circumstances of the Power are not exactly observed, there shall be Relief in Equity for the sake of the matter; Payment of Debts is a most conscientious Thing, and fit for a Court of Conscience to take care of, and see performed; And providing for Children is a thing of the same Nature, they are looked upon as Creditors; and I think this is reasonable, and the Precedents have all gone that way.

Payment of Debts a most conscientious thing.

The Statute of 32 Hen. 8. which gives a man power to devise Lands by Will in writing, recites it as reasonable, that a man should dispose of his Estate to pay his Debts, and provide for his Children, but goeth no further; those were wise and prudent Considerations upon which the Law did enlarge a Man's Power of disposing of his Estate; but there is nothing of either of these in this Case; every one will say he is not a Man of good Conscience that will not pay his Debts, or provide for his Children; but will any Man say that my Lord Duke had not been a Man of good Conscience if he had not given this Estate to Mr. Monk or to my Lord of Bath either? He might lawfully and conscientiously give it to the one or the other; but there is no Consideration of Equity appearing why he should be obliged to it, or to take it from the one to give it to the other, he might use his Liberty according to Circumstances and his own Power.

32 H. 8. c. 1. Sect. 1.

Another Ground of Relief in Equity is Accident, or an Impossibility of complying with the Circumstances when he hath a plain Intention to do it, I agree it is so; but then he might do all that he can, as the Case that was put, of a Man's being obliged to pay or tender Money at such a Place, and he falls sick, or lame, or Bedridden, that he cannot go thither, and it is tendered by another by his Order, or at another Place; this being the Act of God, I think it would be a good Performace of the Condition, and that I think is the best Answer that can be given for the Decree in Popham's Case.

A a

But

But now here when the Duke was informed of his Power, or might have been, and neglected all, and performed nothing, shall this Court supply these Defects, and want of performance? Sure they may as well supply all the rest, that there should be no Hand, no Seal, and for ought I know, no Will or Deed, but only a Parole Declaration.

There is one thing that I should properly mention last under this Head; they object it is not said, that it should be in the presence of six Witnesses altogether: Now it was in the presence of three Witnesses here in England, and three more in Jamaica; and so here are six Witnesses, though not all at once, and there was no Peer to be had as a Witness in Jamaica; so there is an Accident rendering it impossible to have any such, and therefore Equity will relieve against such an Impossibility.

I do agree, if the Duke had gone about directly to make and publish his Will in Jamaica, with an Intention declared to Revoke this Deed, and had had six Witnesses to this his Act and plain Intention, there being no Peer to be had there, it should have been a good Revocation; as in the Case mentioned by the Counsel of Kibbett and Lee, in my Lord Hobart 312. Indeed if the Power were limited to be executed in the presence of three Subsidy-men, it is said in the Book that they must be averred to be Subsidy-men, but yet I take it now that old way of Subsidies is out of use; three substantial Men that would have been Subsidy-men: If that were the present way of Taring, it would be enough, for none such would be had, nor could there be any Peer in this Case that is put.

But to consider the Case and Proofs as to Jamaica, what it amounts to: I would fain know how it appears, that it was the same Will that he executed at Sir Robert Clayton's? The Duke only said, Doctor, this is my Will; perhaps it was the same, perhaps it was not: But how comes his Writing, his Hand and Sealing in the presence of three Witnesses, and declaring it after to be his Will (to make the most of it) in the presence of three more, to be an Execution in the presence of six Witnesses; but beyond all this, here is no Proof that he did intend to publish this as his Will, it is only a private Saying of his on the by, when he saw it among other Papers which then he shewed Dr. Sloan; he was not then solemnly making his Will, or executing his Power; he doth not so much as bid them take notice that he declared that to be his Will, or any thing to make them remember it afterwards: So that I take it, it signifies nothing as to this Matter.

I would trouble your Lordship no longer, for I have been long enough already; I am loth to meddle with the Cases and Precedents, because that may take up too much of your Time; but because the Precedents have been brought me, I must say something to them, to shew that I have read them; I will therefore open some of them, such as I think come nearest the Case.

Cases and
Precedents
answered.

They say, the Common Law goeth as far in relieving upon Cases of Powers of Revocations, as appears by Kibbert and Lee's Case, that I mentioned but now; where a Will is declared to be a writing; so the Case of Thorne and Newman's Payment in another Place than that required in the Proviso: In that Precedent it is recited, that the Indorsement on the Back was that the Money was paid according to the Proviso, and no notice taken of the Place; for upon the very reading of the Indorsement, the Plaintiff was forced to be Non-suit; and afterwards that Matter was disclosed in Equity, that it was in another place than the place in the Proviso, but yet no Relief against his own Acceptance, who was the Party priby.

The next Case is the Case of Guy and Dormer; A Man sells his Estate, with a Power to Revoke by any writing, in express words.

Now here they did not help the want of a Performace, but the Judgment was, the Performace was real; besides I cannot allow that to be any Argument, that if the Law has gone as far as it may, Equity shall go further: To me the Argument runs quite contrary; Equity shall carry it no farther, for Equity should follow the Law.

Equity follows the Law.

There were several Precedents cited by the Plaintiff's Counsel; but I confess, upon consideration of them, very few do come up to the Case in question; I shall take them as near as I can in order of time.

The first is that of Prince and Green, 40 Eliz. There was a Power to make Leases intended to be reserved in a Conveyance by a Covenant to stand seized to Uses, and a Lease is made accordingly, as a Provision for a younger Son. This Power was not long after Mildmay's Case, and the Case in Roll's Abr. 1 Part. Tit. Chancery 378. But because, says the Order, neither the Party nor his Counsel did then know but such Power was warranted by Law, though by late Judgments they were found to be void, and so it was impossible to them to prevent it, the Court did Relieve in this Case to make good the Lease; and it is there said that the elder Brother, who would avoid the Lease, was an unreasonable Man, and this was a Provision for a younger Child, which is not out of Case, neither the Counsel's mistake of the Law, nor a Provision for a younger Child.

The next is the 44 Eliz. the Case of Ferrers and Tanner; A Man deviseth Annuities out of Lands to his Half-Sisters, and gives the Land to his Half-Brother, who makes over his Estate to prevent their being seized of the Rent in order to distrein, and the Court, after some time, and upon sight of a Precedent, did Relieve the Devisees.

Here I would observe how difficult it was even for this Court to do that, for they say, the Heir that had the Land, did promise the Devisor before his Death to perform the Will, and that was a Deceit, otherwise the Devisor might before his Death have done it by a Conveyance, or granted the Land with a Condition to do such an Act, or permit such a thing; and that he did consent afterwards before the Master of Chancery to do it, I will not say but that this Court might

might have declared this Payment without these Circumstances, nor that these might not make the Case somewhat better; indeed in the short Print of the Case in Moor 626. pl. 859. there is no Reason but the Resolution only.

The next Case is in the Year 1655, the Case of Hamilton and Maxwell in this Court, which in short was upon very good Reason, because it was a Provision for a younger Daughter, and that is agreed on all hands to be a good Ground for Equity, and he declared that his elder Daughter was otherwise sufficiently provided for.

Another Case is that of Bowman and Yates, and that is about a Covenant for levying a Fine for raising a Rent out of Lands, which was indeed defective at Law, but decreed in Equity to be paid and satisfied; but if it be looked into, I think it will not appear very pertinent to this Case, it being only to support the Intention of an Agreement upon Marriage: This was 12 Car. II.

The next is the Case of Wallis and Grimes, 19 Car. II. which was this; Sir Thomas Grimes the Grandfather makes a Conveyance in Trust for payment of 500 l. to younger Children, the Heir makes a Mortgage without notice, and this Trust is endeavoured to be set up against the Mortgagee, but the Court would not permit it; but comes not near our Case, for a Mortgagee is in nature of a Purchaser.

Then 20 Car. II. was Pitt and Pelham's Case in the House of Lords.

There this Court did relieve, because it was a plain Intent the Land should be sold, and there was only a want of naming the Person that should sell, and the Law would help that: He that hath the Land shall do that Office, and he that was next door to a Provision for Children, it being for Nephews.

For the Case of Smith and Ashton, besides the Answer my Brother Powel gave to it, it has also this flat Answer to be given, that it was a Provision for Children; that was the next Case in point of Time.

Then comes the Case of Brisco and Peters, 28 Car. II. I have, as carefully as I can, perused that Case, but cannot really observe how it is made use of in our Case, and it is very much to be considered that it is no Rule between two voluntary Conveyances how far a voluntary Conveyance shall be fraudulent against a Purchaser.

The next Case is that of Thwaytes and Dey, which hath also had a full Answer given to it already: It was doubted, whether there was a Seal to it; but the Court seemed satisfied with that; and all the remaining Question was, whether a Man making a Conveyance and reserving a Power to make any other Estate, could charge that Land with a Rent for a younger Child, and the Court held he might, and I think it a good Decree.

These are the Precedents that are made on the Plaintiff's side, there are but few brought for the Defendant's Part, but two that I think are very material; the one is that of Ward and Booth, which hath been opened and applied by my Brother Powel; but I would observe from what he quoted out of the Decretal Order in that Case, that it doth very extraordinarily declare the Limits of this Court's Proceedings,

in

Cases in
Chancery,
1 Part, 80.

V. Cases in
Chancery,
1 Part, 176.

Cases in
Chancery,
1 Part, 263.

in such Cases as these. Here was not a formal Revocation, but a clear and express Intention to Revoke, that doth not appear in the present Case; there should be, I agree, Relief in such Circumstances, if there were Fraud in the Party; if there had been any Accident to render it impossible to execute the Power in all Formality; but here is neither Fraud nor Accident, and therefore, by the Reasons and Rules in that Case, there can be no Relief in this Case.

The other is Arundel and Philpot's Case, and that is so very express an Authority for this Court's leaving the Determination to Law, that nothing can be more: There they say, where it is a voluntary Conveyance against a voluntary Conveyance, you must try and decide the Matter at Law; and it did fall out in that Case, that there was no need of a Court of Equity to interpose, for upon the Trial it did fall out to be proved, that there was a due and legal Execution of the Power, that there was a Tender of the Guinea.

A Voluntary Conveyance against a Voluntary Conveyance to be try'd at Law.

As to the matter of the General Trust, I need say no more than this, whether that would avail any thing upon a Controversy between the Legatees and my Lord of Bath, I cannot tell; but I am sure it is not at all as this Case now stands. Yet methinks as to a General Trust, that it cannot be; for that were to make the Duke use all this Solemnity in making this Settlement to no purpose, and would render this Power of Revocation very useless and idle: The use of this Power was because he had put the Estate out of him both in Law and Equity; and so there could be no General Trust or Means to bring it back again without a due Execution of the Power.

There are but two or three small Objections more that I shall but mention, and conclude.

First, They say several Grants will be avoided if there be no Relief against this Deed, that is, some Leases, some small Annuities to Servants, and a Grant of 100 l. to the Duke's natural Son; this is all. Now whether it is not reasonable to imagine, the Duke thought that the trusting the Earl with so great a part of his Estate, he would have more Honour and Respect for him than to dispute such trivial Matters; and for any Leases or Contracts, they come within the Rule of Purchases, and so the Consideration would preserve them.

Objection

Answer.

Then they say, here is no Monument for the Duke, a Person of so great Quality; but that may be made good out of the Personal Estate; I am sure it is no Objection in Point of Law.

Objection

Answer.

But the last thing they urge, is, If there be no Relief in this Case, you put the greatest Indignity and Reproach upon the Duke that can be imaginable, that he should call Mr. Monk Cousin, send for him out of Holland, to leave his Will with him, in the Will give him so great a Share of his Estate, desire the King to make him a Baron, and appoint his Son to be educated as one that was to make no small Figure in the World; that he should send for my Lord Chief Justice Pollexfen to draw his Will, make three Parts of it, deliver one to the Dutchess of Newcastle, another to Colonel Monk,

and

and carry a third with him to Jamaica, and there take publick Notice of it, and alterall this Expectation raised in Mr. Monk of a Fortune, run him into the Charges of an expensive, but what he knew would be a fruitless Suit: This, say they, is an inconceivable Dishonour to the Duke, to be represented as one that would prevaricate so with the King and the World, and play with the Misfortunes of his Kinsman, and the rather, because the Duke was a plain sincere-hearted Man, and in all this did but pursue his real Intentions of Kindness to Mr. Monk and his Children.

Answer.

Truly, methinks they have just as much to lay on the other side: What shall those many Declarations of Kindness to the Earl before this Deed, in this Deed, and after this Deed by Letters, and other things, signifying his Care of my Lord Lansdown as one he was most concerned for next to my Lord of Bath himself, his petitioning the King to confer on him the Title of Duke of Albemarle in case of his failing of Issue Male, and all this to signify nothing; besides the known Kindred, the apparent Obligations and Merit of my Lord of Bath: Sure if all this be consider'd, the Duke's Honour is as much concerned on this side as on the other, to approve himself sincere in all these solemn Transactions! Would he own him as his nearest Kinsman, and the most deserving of his Blood, and all the while have a secret Purpose in the last Act of his Life to make a Will, by which he would set aside all he had professed to do for him, and by leaving this Deed and Will with him, leave only so much in his hands as should put him into a chargeable Suit for nothing? Therefore, upon the whole, I think there is greater Reason to conclude that the Duke did not certainly mean to do this last Act, as what he would have to stand against so much formerly done the other way: But I rather think the Evidence is strong to persuade any one that the making of this last Will was to satisfy another Purpose, and make his own Condition easy at home.

Wynne and
Roberts's Case,
Antea.

But my Opinion, as to the Judicial Part of this Case, which I thus happen to be of, is the stronger in me, because of the Authority of two Cases, which I take to be express in Point, and those are the Cases of Wynne and Roberts, and Fry and Porter.

In the Case of Wynne and Roberts, there was Proof of a very great Surprise upon the Man, whereby he was induced to make a Will, and to disinherit his Child, of whom he was before very fond, and who was married into a very Honourable Family, and to break a Settlement solemnly made before: All this Matter was charged in the Bill, and proved: But notwithstanding this, the Court declared they would give no Relief; but if they could expect any, they must go to Law, and at last it was ended only by a Bill in Parliament. The Court said, Try it at Law, a Will or no Will, and do not expect the Chancery should make Mens Wills, or set them aside, if legally made, especially then not upon bare Conjectures and Suppositions concerning a Man's Intentions, to relieve against a solemn Act and Title found at Law.

In

In Fry and Porter's Case, one of the great Reasons why the Court denied Relief there, was, that it was a Controversy between two voluntary Conveyances; and there that side that had the Advantage at Law, ought to keep it; and it was without Precedent to Relieve in any such Case.

Cases in
Chancery,
1 Part, 138.
1 Vent, 199.

So I say in this Case, we have no Precedent of Relief in any such as this now before us; we must not say this Court is unlimited, unbounded, by any Rules; it is no doubt limited by Precedents and Practices of former Times, and it is dangerous to extend its Authority further: If therefore I err in my Opinion in this Case, I err with these Precedents on my side; and because I have never a one to guide me the other way, the Defendants are in Possession of a Verdict, Judgment and Title at Law, and I can see no Ground of Equity to Relieve the Plaintiffs against them.

Chancery not
unlimited
and unbound-
ed by any
Rules.

Conclusion.

Then it being very late, the Court put off the delivering the Lord Chief Justice Holt's Opinion, and the Lord Keeper's Decree till another Day.

Die

Die Veneris 23 Decembris, 1693. In the Court
of Chancery, in Westminster-Hall, Comes Moun-
tague, & alii versus Comitem Bathoniensem
& alios; & econtra.

Lord Chief Justice Holt.

In this Case, wherein the Earl of Mountague, and the Dutches
of Albemarle, and others, are Plaintiffs; and my Lord of Bath,
and others, Defendants, I shall open the Case very shortly as it
stands upon the two Wills and upon the two Deeds.

The Case.

There was a Will made in the Year 1675, by Christopher Duke
of Albemarle, wherein there is a Disposition of several Parts of his
Estate upon his dying without Issue to several Persons; but the
main part and bulk of it is given to my Lord of Bath: And in that
Will there is mention made of a particular Esteem and Affection
which the Duke bare to my Lord of Bath; that he was the nearest
of his Kinsmen by his Father's Side; and that he also was indebted
to him for many great Acts of Friendship and Offices of Kindness
performed to him and his Father. Then there is in that Will also
an express Desire that the Title of Duke of Albemarle, by the King's
Favour, might be conferred upon the Earl of Bath; and that the
eldest Son of the Earl of Bath, and so the eldest Son of the Fa-
mily successively, should be called Lord Monk: So that the Names
of Albemarle and Monk may, with the King's Favour, remain
with his Estate in the Posterity and Family of my Lord of Bath,
in memory of the late Duke his Father and himself.

The Estate being so disposed of by his Will of 75, there are two
Deeds made in the Year 1681, a Lease and a Release. The Re-
lease doth recite this Will; but in the Recital of it, there are some
Differences from what is in the Will it self, some Variations from
it. In this Deed it is mentioned, that the intent and design of the
Deed was to dispose of the Estate, according as was in the Will:
And whereas it might be thought strange that the Duke by his last
Will, which by that Deed he doth confirm, and not intend to re-
voke, should give away his Estate from the Heir at Law; Therefore,
for the Satisfaction of the World, the Duke doth declare the Rea-
son which hath been frequently mentioned; and then the Deed dispo-
seth of the Estate, some to the Greenvils, some to the Clarges, but
the main and bulk of the Estate he settled upon my Lord of Bath. But
in this Deed there is a Power of Revocation, to this effect, That
it shall be lawful for the Duke at any time to revoke this Deed,
upon the Tender of a Shilling, by Writing under hand and Seal,
in the Presence of Six Witnesses, whereof Three to be Peers of
the Realm, and then to limit new Uses. Then

Then he makes his Will in the Year 1687, and therein he gives his Estate in a different manner, that is, the bulk and main of it is given, instead of my Lord of Bath, to Mr. Monk, whom he supposeth to be his Kinsman, and desires that the Name and Title of Baron Monk may, by the King's Favour, be bestowed upon him, in case he himself died without Issue.

Now the Question is, Whether or no this Will in 87 hath revoked this Deed made in 81 in Equity, for there are but three Witnesses to this Will, and not one of them a Peer; so that in Law it is very plain it is no Revocation at all: It cannot be a good Revocation there, because the Power is not pursued, the Circumstances are not observed; there is neither the Tender of a Shilling, nor six Witnesses, whereof three Peers; nay, not only so, but here are but three Witnesses in all, and not one of them a Peer. The Question.

I am of the same Opinion with my Lord Chief Justice of the Common-Pleas, and my Brother Powel, that this is no Revocation in Equity, and that there ought to be no Relief had by the Devises of the Will of 87 against those that claim by the Deed of 1681.

These Things are to be premised as granted, and not to be questioned.

First, That the Will of 75 was a good Will, there is no manner of dispute to be made of that. Things admitted.

Secondly, This Deed of Release that was made in 81, is a very good Deed, and there is no manner of dispute to be made of that neither; for if there had not been a Verdict in the Case, yet if they come to have the Opinion of a Court of Equity, touching Relief in Equity about this Deed, it ought to be taken to be a good Deed in Law, or they were not to come hither for Relief against it. And as this Deed is admitted to be a good Deed, so in this Debate all those Circumstances that appear in the Depositions are to be admitted to be true in this Cause. I do not say that they are never hereafter to be controverted, but now upon this Debate they are to be admitted true; as,

First, That Sir William Jones his Hand is to the Perusal and Approbation of the Proviso, and it is his Writing.

Secondly, That he was a Witness to the Execution of this Deed: And,

Thirdly, That this is true which Errington swears about the Abstract of this Deed made by Sir Thomas Stringer, which being main Circumstances about the Deed, and controverted, now must be taken for true in the Consideration of this Cause. And then a third thing that is to be admitted without any Contradiction too, is, that this Will of 87 is a good Will.

The Cause standing thus, and all these things being taken for granted, the Question I say will be, Whether those that claim by this Will of 87, can have any Relief against those that claim by the Deed of 81? And I think there ought to be no Relief; but those that claim by the Deed of 81, have a good Title in Equity as well as in Law.

Four
General
Heads in
question.

1.

I shall not mention any thing of the Evidence that hath been given, or insisted upon to support the Deed, nor now answer any of the Objections made against the Truth of it; for I told you first, I take it for granted, that it is a good Deed, and a true Deed without all dispute. But to the Intent I may comprehend all the Matters that I think are any way considerable, and fit to be insisted upon, I shall speak to Four General Heads.

1.

First, I shall consider, whether upon the frame and manner of this Deed of 81, there may be any Ground of Relief for the Plaintiffs against it.

2.

Secondly, Whether there appears upon the Proofs and Depositions in this Cause, that there was any undue way or manner of obtaining this Deed from the Duke; or any Way or Contrivance, or Management for the contriving it in being afterwards, which may produce a Ground of Equity for the Advantage of the Plaintiffs.

3.

Thirdly, I shall consider the Circumstances and Conditions of the Parties that are in this Cause, those that claim by the Deed of 81, and those that claim by the Will of 87, and whether upon that Account there can be any Equity raised in this Cause. And,

4.

Fourthly, I shall consider the Person of the Duke of Albemarle, and the particular Circumstances he was under at the time of making this Will in 87; and whether by reason of him from whom the Estate proceeds, or the Circumstance he was under, there will appear any Ground of Equity in this Case.

1. Consideration.

The first Consideration I say will be, Whether upon the frame and manner of this Deed there be any ground of Equity for the Plaintiffs against it. There were several things under this Head that were insisted upon by the Counsel for the Plaintiffs. As,

First, That this Deed of 81 doth partake of the nature of a Will, because it recites a Will, and it is made to confirm a Will, and therefore shall be revocable in a Court of Equity as a Will shall be in a Court of Law.

Secondly, That it pretends to recite the Will of 75, and there are several Mistakes in the Recital, and very great Variations from it.

Thirdly, That there are several Dispositions different from those in the Will, which it pretends to confirm.

Now for the first, to maintain that when a Deed recites a Will, and to say it self is made to confirm that Will; therefore this Deed shall be revocable in its nature in Equity, as a Will is at Law, I must needs say, is a Notion that I never heard started before. Therefore for that I must appeal to you, who are constant Practisers and Attendants here, whether it be not a Notion altogether new. And to me as it is a new Notion, so it is very fine, and seems impossible to be supported by any Reason, but must produce very strange Absurdities. It is not to me to be reconciled with any Reason of Law or Equity, as far as I understand any of either.

For to say that a Deed is revocable, because it relates to a Will, is first to contradict the nature and essence of a Deed; for a Deed takes effect immediately upon the sealing and delivery, and is impossible to be altered from what it is, and has in it, or to be revoked by him that made it. But because it relates to a Will, it shall be revocable as a Will is; that I say is a meer fine-spun strange Notion, not at all agreeable to Reason.

To say a Deed that relates to a Will, is therefore revocable as a Will is, not agreeable to Reason.

Next, such a Construction and Strain as this in Equity must overthrow the Intention and Design of him that made the Deed: For when a Man has made a Will, which is not consummate till his death, and after that makes a Deed, and limits the Estate in such a manner as it was disposed of by the Will: What does this Man mean but that those Estates which were, or arise by the Will upon his decease, shall have immediate effect during his Life? And whereas he thought with himself it might not be so convenient to leave his Estate wholly to depend upon a Will which might so easily be altered, it was his Mind and Intention that it should be made more firm by a Deed, which is more permanent.

Next, it is a mighty Strain to make a Deed revocable as a Will; for then you must first set up against that Will which was thereby revoked; for you cannot imagine, but that when a Deed is made, though to confirm a Will, the Estate limited thereby doth arise by the Deed, and the Will is revoked by the Deed. So you set up a Will that is no Will in Law, and that shall control a subsequent Deed which destroyed that very Will, which is strange and contrary to all Rules of Law and Reason.

Where a Deed is made to confirm a Will, the Estate limited thereby doth arise by the Deed, and the Will is revoked.

There were some Cases quoted wherein a Deed shall control a Will; as Dyer 49. it is said, If a Man makes a Feoffment to the use of his Will, which was annex'd at that time to the Charter of Feoffment, that that Will is revocable, notwithstanding there is an express Application in the Deed to that Will it self, and so the Uses arise by the Deed, not by the Will; and yet tho' this Deed hath relation to the Will, that Will may be revoked.

This indeed hath the Terms put in the Case, but in Reason is no way applicable to it. When a Man makes a Feoffment, and annexes his Will thereto, there the Design is that the Estate should arise, not immediately upon the Feoffment, but attend upon the Will. But if a Man make a Deed of Feoffment; and says it shall be to the use of such Persons, and for such Estates as in his Will, or as he shall give according to the Will, there tho' the Will doth mention the Names, and limit the Estates, the Uses do not arise by the Will but by the Deed: For tho' the Will be no part of the Deed, yet when the Deed doth refer to the Will, and the Will hath limited the Estate, it is as much as if all the Limitations had been comprized in the Deed.

And I take it that a Deed is not revocable, because it hath an immediate effect, and can be no otherwise revoked, but according to a Power reserved in the Deed it self. And that is Hussey's Case, Moor 756. A Man makes a Will, and he makes a Feoffment to the Uses mentioned

A Deed not revocable without a Power reserved in the Deed it self.

in

in the Will, tho' the Will be revoked, as sure it is, yet it is a sufficient Declaration to the Uses.

Objection

It was further urged, for the Support of this Notion, what is said in Hobart in the Earl of Ormond's Case. The Case is put a little short in the Book. A Man suffers a Common Recovery to the use of such Person and Persons, and for such Estate and Estates, as he should dispose of, and to, in his last Will. This was a Case in Ireland, and before the Statute of Uses was made there; and so we must look upon it in England as a Case before the 27 H. 8. and then there being a Feoffment made, he remains Cestuy que use in Fee in the mean time, for he hath a Power by Will to dispose of the Use, according as is expressed in the Deed. Then he makes a Deed in his Life-time and giveth away the Inheritance of this Use, and afterwards makes his Will. Now here is a Deed that giveth the Inheritance of the use away; and here is a Will that doth controul and alter the disposition of this Deed. This was the use that was made of this Case.

Answer.

Now in answer to that, Suppose it were so, this Will is but an Execution of that Power which proceeds from the Deed; for when a Man makes a Feoffment for the use of such Persons, and for such Estates as he shall limit by his Will, it is not the efficacy of the Will that disposeth of the Estate, but it is by virtue of the Deed: So that the Deed in his Life-time was no execution of the Power reserved in the first Deed, which was only to do it by a Will.

But I must say this further to the Case of the Earl of Ormond, that I do not take that Opinion of the two Judges, Hobart and Doderidge, there delivered, to be Law; and there were other two Judges, Montague and Hutton, that were of another Opinion, and others were of their mind, and it did not come to a Judicial Resolution. And my Opinion is this, that if a Man made such a Feoffment before or after the Statute of Uses, he hath the Fee-simple of the use vested in him in the mean time, and therefore hath a Power to dispose of it. And if he doth by Deed in his Life-time dispose of it, that is a good Disposition, and the Will shall not controul it, for he is as much Master of the whole Estate, both before and since the Statute of Uses, as if he had made a Feoffment in Fee to the use of himself; and then an absolute Disposition of this Deed doth extinguish and destroy the Power. If he from whom the Estate moved doth reserve a Power in any particular manner to limit any Estate or Estates by his Will, the whole Fee-simple is in him, and no Act he doth do to dispose of the Estate, will hinder him from executing of that Power.

And as for this I shall quote you but one Case, and that is in Lee 39, Broad's Case: A Fine is levied to the use of such Persons, and for such Estates as the Cognizor should limit and appoint by his last Will, and so the Case comes home to this Case; he after this covenants to stand seized of these Lands to the use of his second Son and his heirs, and then makes his Will, and disposes of the estate therein according to the power. The question was, which of these dispositions should take place, the Deed or the Will? The Will was according to the Power, reserved upon the first

first Fine: and the Deed intervened before they come to execute this power; it was there held that having made a disposition of the Estate by Deed, tho' by a Covenant to stand seized, that should take effect, and the Will, tho' made according to the power, came too late to execute it. So that I think none of these Cases that have been mentioned for this purpose are applicable to the Case in Question, nor argue or prove any thing material for that which the Plaintiffs Counsel intended them for.

As but say they, this Will of 1675, & Deed of 1681, make but one Conveyance, and then the Will that is the principal, that shall govern all the rest. Now this is a notion fetched from the Courts of Law, but very improperly applied in this Case as I think: For this Will being revoked by this Deed, is no Conveyance at all; where several Acts make but one Conveyance, every one has its distinct operation to carry on the main design. As a Lease and Release, the Lease conveys the possession for Years, the Release conveys the Inheritance to the possession by way of enlargement. So a Fine and Recovery, and Deed to declare the uses, make but one Conveyance, but each performs its particular part: the Fine conveys the Freehold to one man, and upon the Recovery it is conveyed to another, and upon the limitation of the use it is conveyed to a third; all are preparatory Acts necessary to complete the Conveyance of the Inheritance whither it was at first designed.

But how will they make a Will that hath no substance to be one Conveyance with a Deed, that before destroyed that Will? I cannot see how, nor is it reconcilable with Law or Reason. So that for that matter, I think they have no ground to insist upon this point, that this being a Deed relating to a Will, may be revocable in Equity as a Will is at Law.

But to go on to the next.

This Deed doth say it was made and intended to confirm the Will, and yet makes several recitals and limitations contrary to it.

Why suppose it were that it did recite the Will truly, and said the Will disposed of the Estate so & so; & then adds that it was made to confirm the Will, but yet disposeth of the Estate quite otherwise than the Will doth, shall this avoid the Deed in Equity, or make it to have another Consideration than it else would have? The re-citing part of a Deed is not at all a necessary part either in Law or Equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation. But when it comes to limit the Estate, there the Deed is to have its effect according to what limitations are therein set forth. And that is plain and full, without any manner of contradiction whatsoever.

Now because a Deed is repugnant in some part, that is material, to what is immaterial, is that any ground in Equity to set aside this Deed? Or make it more liable to a revocation than if they had been consistent? That seems strange. Then here are mis-recitals and mistakes, which I take to be mistakes of the Clerk: and shall these mis-recitals of the Will in the Deed destroy the effect of the Deed, when the meaning and intention of the parties is most manifest and clear how the Estate shall go? There is no reference in the limitations of the Deed to the Will, but only in the Recitals, and there are mistakes. Now

Obj.

Anf.

Where several Acts make but one Conveyance, each has its distinct operation to carry on the main design.

The reciting part of a Deed is no necessary part either in Law or Equity.

A Deed repugnant in some part that is material to what is immaterial, no ground in Equity to set it aside.

if the Limitations of the Will and Deed are not applied to the mis-recitals in the Deed, then those mis-recitals cannot hurt the Limitations in the Deed. If so be the Limitations in the Deed had been general to such as were before recited to have been limited in the Will, then there had been some ground to infer that these mistakes should be a foundation for Equity to rectify those mistakes. For that supposes the Recitals in the Deed containing the disposition of the Estate by the Will are right, and would come too late at the time of the limitations to recite them, and that were a mistake, that may be a good ground in Equity to relieve against the mistake.

But when it comes only by way of recital to be disposed by the Will one way, and then doth in express words limit it a contrary way, the Intention is plain that it should go according to the limitations in the Deed: and there can be no foundations in Equity to set it aside. The Rule of Law is, *Benigna sunt interpretationes Chartarum*. And I suppose there ought to be a great deal more indulgent interpretation of them in Equity, to maintain the intention of parties. So that as to that first point concerning the frame and manner of this Deed, and the contradictions to and mis-recitals of the Will in it, there is no foundation of Equity to relieve the Plaintiff against the Deed, unless the power of Revocation in the Deed were legally pursued.

See and Consideration.

The next thing is, whether there be any thing proved in the manner of obtaining it from the Duke, or mortgaging or continuing of it after it was obtained, be any foundation for Equity to relieve against it? And for my part I see none.

First I do not see any manner of Evidence to prove any indirect practice for the obtaining of this Deed from Duke Christopher. The most that can be made of it is but bare suspicion, and indeed that a very slender one too.

But say they, can you prove the Duke ever read it, or had it read to him? That is a strong objection, when it is proved to be before Witnesses, and so many; sure that is but a slender ground of Equity the not reading of it. But nothing of surprise, or ignorance in the Duke of what he did in it, ought to be supposed, because Sir William Jones, who is proved to be the Duke's Counsel, was by, and a Witness to it. I told you at first Sir William Jones's Hand to be to the Draught and Deed must be admitted, because I take it for granted that this at Law is a good Deed. And if I did not take it for granted that that was Sir William Jones's Hand, and he was a Witness to the Deed, I should not take it for a good Deed. But I meddle not with the point of Fact, but take the Fact to be granted to bring the Judicial point in Question, so that it is his Hand, and he is a Witness to this Deed.

Then secondly, it must be imagined that when Duke Christopher made this Deed, he did it with some design or for some purpose or other, and if so, you cannot imagine that the Duke was at all surprised therein, but that when it was executed it was according to that design and purpose.

Next Sir Thomas Stringer, who was the Duke's Council to peruse and amend the Draught, as appears by his own Hand, sworn by his Son, and his man, To imagine then that a man should be surprized unto the making of a Deed when his own constant Council doth peruse and amend the Draught, and the Counsel he used particularly to advise with, is by at the Execution, and a Witness to it; is to say, A man was surprized when he had the advice of Counsel about it, and they were at his Elbow at the executing of it.

Now I must confess I am to seek, and not well know what is a Fraud in Equity, that will avoid a Deed, which is a good Deed at Law. The Case of Bodvile, and Wynne, and Roberts mentioned by my Lord Chief Justice, and my Brother Powel, that spake the last day this Cause came on, is I think a Case of great Authority in a Court of Equity, because it had a great translation both in this Court and in the House of Lords, before it came to a Resolution or Result. I shall put the Case in short as it was here in Court.

Bodvile,
Wynne, and
Roberts's
Case, V. Rep.
in Chan.
1 part 236.

Mr. Roberts, Son to the late Earl of Radnor, married the Daughter of Mr. Bodvile. Bodvile had made a Will, and given his Lands to the Children of his Daughter in Tail, and after this he makes another Will whereby he gave one part of the Estate to Mr. Wynne, and another part to a remote Kinsman. It did most plainly appear in the Depositions of this Case, that this Will was obtained by great Fraud and Circumvention; that is, Wynne got into his acquaintance by pretences of some little Offices of Friendship and Kindness, he got him away from his Friends and Relations, and during his sickness he did by false stories draw his affections from his Daughter, kept him in secret places, that no friend might come at him, and while he was so secreted and wrought upon, was this last Will made, whereby he gave his Estate away from his Child to a Stranger. All these pieces of practice were apparent before the Court at the hearing of this Cause, which was heard by my Lord Clarendon, assisted by

who all unanimously declared, that this was a Will obtained by fraud and by practice, and that there was great Reason if they could, to relieve against it. But they searched precedents, but could find none that would come up to the Case. Thereupon for difficulty, there was advice taken about it in the House of Lords; and there, upon Consideration, was an Order made, by way of advice to the L. Chancellor, that he would proceed to do Justice to either party, tho' there were no Precedent found to govern the Judgment. Afterwards this Cause came to be heard again 12 June 1666. when my Lord Chancellor being assisted by my Lord Chief Justice Bridgman, my Lord Chief Baron Hales, and Mr. Justice Raynsford did declare, that there could be no relief, tho', as it was said before, it was apparently a Will obtained by Fraud, and this to the prejudice of the Heir at Law, who had never offended, or given him any cause to disinherit her. So the Bill was dismissed, but the Parties complaining in Parliament, were relieved by the Legislative Power by an Act of Parliament.

Now, besides that there was Evidence of ill practice in that Case, but

but in this I say, I find none; this is so great an Authority, and does shew the wariness of a Court of Equity, that I think none can be greater: Equity would not relieve them, but they were put to seek their Relief by a Law made on purpose.

But I will suppose now in this Case, that when my Lord of Bath did understand the kindness of Duke Christopher, and knew of the Will of 75, and knowing the inconstancy of the Duke's temper, and other Circumstances in the Family, and the Revocableness of a Will, should have applied himself to the Duke, and told him, It is true, you have been so kind as by your Will to bequeath me a great part of your Estate, but you may be prevailed with on a sudden or by some Artifice or other, to alter this Will of yours; and you may be surprized into the doing of it; pray will you make a more solemn Settlement to confirm this kindness by a Deed; and had prevailed to get him to do it. Suppose I say he had done so, tho' I find no Evidence in this Case of any such thing; suppose he had been employed in the whole transaction of such a Deed, is this unlawful? Or is it any harm? No, it is very innocent, he might lawfully do it; and if he had opportunity he might prudently do it. But I say, I find not so much as that in this Case, but this Deed was fairly obtained from the Duke; whether it was by the Advice, desire, or interposition of my Lord of Bath, doth not appear, or whether it were the Duke's own voluntary Act, tho' I think it is not material, whether it was the one or the other.

Obj.

But it hath been said, that when Duke Christopher did design to alter his Will, and for that purpose sent for my Lord of Bath, to bring the Will of 75, which he had in his custody, my Lord of Bath should have told him of this Deed too: And therefore the concealing of the Deed of 81 from Duke Christopher is a kind of fraud; and not making a discovery of it then, he shall not now take advantage of this slip, and have the Estate by this Deed; because if the Duke had considered the Proviso in the Deed, he would have taken effectual care to have had a good Revocation in all the Circumstances: And that he did not so revoke it, must be imputed to the Concealment of this Deed from the Duke, by the Earl of Bath.

Anf.

So was the Case of Mr. Clare, at the Suit of the Earl of Bedford, which was opened the last Term. A man that stands by and sees a Cheat, which might have been prevented by his discovery, shall not take advantage of his own wrong and profit by such Concealment. But doth it appear in this Case, that my Lord of Bath knew to what purpose the Duke sent for his Will; or how or in what manner he would alter the Settlement of his Estate? Why must he be bound to take more notice of this Deed to the Duke, than the Duke himself? It was the Duke's own Act and not my Lord of Bath's, and why should he give him Notice of his own Act?

The Rule of Law, when one is obliged to give notice to another, is this: when the thing lieth more in the knowledge of the one than the other, and he cannot come to the knowledge but by his means: But when one man hath reason to know, and doth as much as the other, he is not bound to give notice to that other.

Be.

Besides, it doth not appear, as I remember, (for it is some time since this Cause was heard) that my Lord of Bath did know to what purpose the Duke did call for his Will; and the Deed and Will were possibly both in the Custody of the Duke; for tho' at the time of the execution of the Deed it was delivered to my Lord of Bath, yet that was only for the due Execution as a Deed; for my Lord in his Answer saith, he knoweth not where it was afterwards, till delivered to him by the Duke with the Will, under one Cover, some short time before he went abroad. And so there is great Reason to induce the Belief that it was in the Duke's Custody.

Then as to the Objection of Secrecy, it is kept secret all along, and no body can give any account of this Deed. Take it for granted it was so; shall a Settlement in a Family (where the nature of the thing requires Secrecy) because it is kept secret, be set aside for Secrecy? It ought to be kept secret, and that is no Objection at all; Persons do not usually intend that all the World should know how their Estates are settled.

But say you, at least here is a general Presumption, take all together, upon the Circumstances of the whole Case, that there was some kind of Management in concealing this Deed. Now, in a Court of Equity shall Presumption be sufficient to found a Decree upon? If that shall avail in a Court of Equity, it is an easie matter, according to the Judge's Faith, to presume a Man out of his Estate. There are Presumptions of several sorts, some are violent, and some probable: A violent Presumption, that such a Man hath done such a Fact, must be when a Fact is done; and no other can be thought of to have done it: As if a Man be killed in a Room, and another Man comes out of the Room with a Sword bloody in his hand, and no body else was in the Room. Here is a plain Fact done, and tho' no body can swear they saw this Man do the Fact, that he killed him, yet from this Evidence there is a very strong Proof.

Presump-
tions of two
sorts, Violent
and Probable.

Of what
force.

But a probable Presumption alone is no Proof to rely upon; where indeed there is some Proof of Witnesses positive, and the Presumption is probable that is added thereto, it may be a good fortifying Evidence, but it signifies very little of it self for a Foundation.

So that I think here is no Proof or Evidence, that my Lord of Bath did surprize the Duke; or that the Duke was surprized in this matter; or that there was any indirect means used to conceal it from the Duke. And so I have done with the Second head that I at first proposed. Therefore,

Thirdly, I come to consider the Persons that are concern'd in this Cause, that is, those that claim by the Deed of 81, and those that claim by the Will of 87. Those that claim by the Deed of 81, are Relations of Duke Christopher without all Question: My Lord of Bath that is intituled to the greatest part of this Estate, is a very near Relation, and a Person that had done many Kindnesses for the Family, had been constantly assisting to the Duke in his Business; and the others are near Relations too.

Third Con-
sideration.

E e

Then

Then for those that claim by the Will of 87, Mr. Monk, that claims the main of the Estate, is in the Will called Cousin; but it is plain (if at all) he is not so nearly related: So that when in respect of the Persons that claim by contrary voluntary Settlements, there is an even Equality of Relation, and no difference of Consideration (much more when there is an Inequality) he that hath the best Title at Law must carry the Estate? For what is it that makes the difference, but the difference of the Consideration? As in the Case of a Deed in Consideration of Blood, and an After-Deed to a Purchaser for a valuable Consideration; the last shall take place, as the best Consideration.

But for revoking a voluntary Settlement, in favour of a subsequent one, where there is no difference between the Parties as to the Consideration, I think hath no ground in Reason. There is as much Equity for the one as the other. It is perfectly at large, and I take it to be a constant Rule, that where one Party hath no more Equity than the other, the Law must take place, and that in this Case being manifestly for my Lord of Bath, by this Verdict, Equity ought not to take it from him.

Cases in
Chan. 1 part,
263, 264.

This principally was the Foundation of the Decree in that Case of Smith and Ashton, that has been likewise mentioned and urged before: There was a Power under Hand and Seal to be attested by three Witnesses, and to charge the Estate with Portions for younger Children; so it is a limited Power: Then he makes a Revocation for advantage of younger Children, but not exactly pursuant to the Circumstances of the Power. This was held good in Equity, and all the Reason in the World it should, because a Man is obliged to provide for his younger Children; and it is against all Justice and Reason to make such a Settlement upon the Eldest Son, as to send all the other Children a begging, being under the same natural Obligation to provide for the one as the other. Therefore, because of that natural Obligation, Equity hath been indulgent to support such Provisions, because the first Settlement that disabled him for it, was wrongful and insidious, and contrary to all Equity, and then in such case Equity is very indulgent.

But I would put this Case: A Man settles all his Estate upon his younger Son for Life, with a Power to revoke by a Deed, sealed in the Presence of three Witnesses; without more ado he makes his Will, and disposeth of his Estate to his eldest Son wholly, and that Will is attested (as put it before the Statute) by two Witnesses: Is this a good Revocation in Equity? I say, no; for the one is as nearly related to the Father as the other, the Considerations are equal, the one is as much a Son as the other, and therefore there is no great difference between them; and the younger Son who hath the Estate by Law, shall enjoy it, tho' afterwards it return back to him that was the eldest.

Fourth and
Last Consideration.

The Fourth and last Point is this, Whether in respect to Duke Christopher, and those Circumstances that attended him, there be any Reason to relieve against this Deed in Equity. And here.

First it is said, If a Man make a Feoffment with a Power of Revocation under such Circumstances, and doth make a Revocation, where all the Circumstances are not observed, is he such an Owner still of the Estate as that Equity shall support the Disposition?

I say, no; for that is to set up Equity in direct opposition to the Law: For when a Man hath restrained himself by a particular Power, and hath no legal Right to dispose of this Estate, but by exactly pursuing that Power, Equity cannot enlarge that Right or Power.

Legally you agree he cannot; for if he could, then were there no Reason for imploring the Aid of a Court of Equity: And there is the greatest Reason he should be obliged by the Rule of Law in a Court of Equity, because it is a Law that he hath put upon himself: And that is the Equity of the legal Obligation, because it is supposed to be made by his own express or implied Consent, by his Representative to all Laws. Here is a Man that hath made a Deed, whereby he has actually restrained himself from disposing of his Estate; but in such or such a way. By the same Reason, that you in a Court of Equity will construe it a good Execution of the Power, where the Circumstances are not strictly observed, you may allow a Man to revoke a voluntary Settlement, when there is no Power reserved to him in the Deed so to do: And that I take it no one will be so hardy as to affirm.

A Man voluntarily makes a Settlement to the use of himself for Life, and after to other Uses, and reserves no Power of Revocation at all, he cannot revoke this; no, not in Equity: And the Reason is the same as to the Power reserved, where it is not pursued; for he has no other Right to do it but by the Power, and it is as if he did it without a Power, unless he make a due use of such a Power as he had.

Where a Power is reserved, and not duly pursued, it is the same as if he did it without a Power.

It will be manifestly inconvenient, if a Court of Equity have such a Latitude in Power of Revocation: For it is not sufficient to say it is unreasonable a Man should be restrained, when a Man will restrain himself: nor do I see what Reason there is to say it is imprudent. Indeed, to argue thus, is to make a Man less Proprietary of his Estate, than the Law hath made him, that he shall not settle his Estate in such a manner as he pleaseth to order for himself; a Man at this rate is never master of his Estate: He makes the first Settlement as Owner, and it is no matter whether he hath a Reason for making it or no, *set pro ratione voluntas*; but then when he hath so done, both Law, and Reason bind him to observe it, and there is no Reason for a Court of Equity to avoid it.

I must confess, Courts of Equity would have enough to do, if they were to examine into the Wisdom and Prudence of Men, in disposing of their Estates, and if they were not discreetly, but foolishly done; therefore to set them aside, there would need more Courts of Chancery than there are, to dispatch the Business of Equity in this Point: But be a Man wise or unwise, if he be legally *Compos mentis*, he is the disposer of his own Property; and tho' he do not

Be a Man wise or unwise, if legally *Compos mentis*, he is the Disposer of his own Property.

dispose

dispose of it so discreetly. as a Judge or a great Lawyer would do, there is no Reason Equity should interpose to alter it.

Besides, there may be a very good Reason for a Man to put such a Restraint upon himself, and for a Wise Man to do it too; for a Man may know the frailty of his own Temper, how apt he may be to be surprized and prevailed upon to make a precipitate or inconvenient Will, Settlement, or Disposition of his Estate. Now to restrain this Infirmary which I have, and to prevent an Inconveniency that may arise by my disposing of my Estate upon a Surprise, I will restrain my self, and settle my Estate so and so, that if there be a deliberate Intention in me to alter it, I may solemnly execute such Intention; I will therefore have so many Witnesses, and those of good Quality, that, if they find me about any such Action, may advise me in it, and prevent any apparent Surprise into the doing of any Action that may be foolish, rash, or prejudicial: For that Reason I will bring my self under such and such Restraints.

And when we see a thing done that may have a good Reason given for it, as there may be for this circumscribed Power, to restrain from rash, sudden Actions, it is to be presumed that it was done upon good Reason; and therefore the pretended unreasonableness of setting the Owner of an Estate by himself, mentioned at the Bar, is no Argument against it: For it may be rather (and that is rather to be presumed) upon very good Reason than upon no Reason at all.

*Arundel and
Philpot's Case.*

Now I think it was never yet determined, or settled in a Court of Equity, that a Revocation that did not pursue the Power was good in Equity: It has been settled and decreed not to be good, and that is the Case of Arundel and Philpot, which came first into the King's Bench, and then into Chancery, and afterwards into the King's Bench again, and there it had its Period. A Woman makes a voluntary Settlement upon a Friend, with a Power to revoke upon the tender of a Guinea; and upon some falling out or Quarrel that happened between them, she makes another Settlement upon Arundel: At first in the King's Bench they could not prove the Tender of a Guinea, and so the Revocation was not good at Law; therefore they come into a Court of Equity to be relieved. It was held that no Relief should be had in the Case, altho' there was a Proof of Provocation given, a Quarreling and Falling-out, and so there might be some Reason to revoke, but no Reason to revoke otherwise than according to Power: So the Bill was dismissed. Afterwards upon a Tryal at Law, that Matter was substantially proved, that in the heat of the Provocation the Guinea was tendered, and consequently a good Revocation; and that I look upon as a full Authority that there can be no Revocation in Equity where it's not a good Revocation at Law, unless there be a particular Intention in the Party to revoke, which he could not effect pursuant to the Power, by Fraud or Accident.

*No Revoca-
tion in Equi-
ty that is not
good at Law,
unless the In-
tention hin-
dred by
Fraud or Ac-
cident.*

The Case of Thorn and Newman I take to be good at Law, and therefore to be sure good in Equity; There was to be a Tender of 12d. at a Day, in the Middle-Temple-Hall, the 12d. was tendered at the

the day but not the place, and accepted. That was before my Lord Chief Justice Hales, and the Party nonsuited upon it. For upon a Condition to pay money at such a day and place, the money be tendered to the Persons at the day, tho' not at the place, that Tender to the person is good, being a Case of money, but it is not so in a Collateral Condition for doing of any other thing. And tho' it had not been in that Case good at Law, it might be held to be good in Equity upon another account; because, there were Children in the Case, and it was to make provision for them.

Now I do acknowledge that a Power of Revocation not well executed at Law, may be in Equity in some other Cases: As where a man having such a Power has a real intention to revoke, and his intention is known, but he is prevented by a particular accident, and surprized when his design was so to do, but he could not perform that design, as by reason of Sickness, or that it was to be done in a place where he could not go. If any accident obstruct that intention, it shall be lookt upon as good, and shall prevail.

But how in this Case of the Duke of Albemarle, it doth not appear that he had any such intention of executing his power. It is true, he made his Will, which is a quite contrary disposition of his Estate. That is an Evidence of his intention to make a new Will, but not to revoke this Deed; he was no way hindered by any accident or irremovable Impediment from executing the power according to the Circumstances. He was in the place where best of all throughout England he might have had three Peers to be Witnesses of it. The Will was executed in London, at Sir Robert Clayton's house, and there were then two Peers in the house; Therefore since he had an opportunity to do it well, and would not do it, this can never be construed a good Revocation in a Court of Equity. And I think truly that any such construction would induce many Absurdities. For,

Absurdities
that might
follow.

First, It is to set up a power in a Court of Equity in direct opposition to the Courts of Law, and so let a man loose in Equity for no other reason, but because he hath restrained himself at Law, by a Law of his own making.

1.

Secondly, It is as much as to say, That because a man may dispose of his Estate one way by Law, therefore in a Court of Equity he shall dispose of his Estate any way. That is a very strange but a true consequence of this Doctrine, because a man settles his Estate such a way, with such a power to alter it in such circumstances, therefore he shall do it any way. At this rate Tenant in Tail may dispose of his Estate without a Fine in Equity, because he might have done it at Law with a Fine; for the same Equity there is in both Cases. So a Copyholder of Inheritance may in Equity dispose of his Estate without a Surrender, because he might do it at Law by a Surrender.

2.

If f

Thirdly.

3. Thirdly, It were to enable a man to give away more than he hath in him, for he has no more in him than according to the power reserved to himself. And,

4. Fourthly, It is to frustrate the intent and design of all Settlements whatsoever; so that I think there is no reason at all for this Court to let a Man loose, that has thus restrained himself, unless there be some special reason in the particular Case, for the sake of which a man ought to have his Case vary from the ordinary Rules.

Then let us consider next the Circumstances that the Duke was under at the time of making this Will; you that are for the Plaintiff say that he had forgotten this Deed, and therefore it being an old and forgotten Deed, it shall not have any regard in a Court of Equity, it not being taken any notice of by the party himself.

Objections answered.

First I pray consider whether the Evidence does not prove the quite contrary: it was a Settlement made very solemnly; it is very well attested by six Witnesses, Persons of consideration; it was done with deliberation, and done but in 81, the Will is in 87; it is not to be presumed that the Duke did or could forget a Settlement so solemnly and deliberately executed. I say it is hard to presume it, but rather the contrary, that he did not forget it.

Besides tho' he had forgot it, Sir Thomas Stringer who was so instrument about this Will had not forgot it, for he made an Abstract of it about that time with the very date in it. And I take it the memory of the Council in such a Case, is the memory of the Client. Suppose a man make a Purchase and he carrieth the Deeds of the Title to Council, and he espieth a trust in the Deed, and acquaints his Client, and yet he will purchase, shall Equity relieve? It may be the Council overseeth this Trust, and the Purchaser is called to account about it; says he, I had no notice. I knew nothing of any such trust; I am a Purchaser for a valuable consideration, and it ought not to affect me. But then they come and prove that the Deeds of the Title were carried to Council, they saw this trust or had an opportunity to see it. Then I take it, notice to the Council is notice to the Client, and the man that paid the money must lose the Estate: So here Sir Thomas Stringer's memory is the Duke's memory.

But pray how comes it to pass that forgetting of a Deed is a ground to revoke in Equity? Must the goodness and validity of a Deed depend upon the memory of him that made it? Memory is slippery, but a Deed is permanent, and made to abide for ever. Because men are apt to forget what they have done, therefore shall their Deeds have no more effect in a Court of Equity than if they had never been done at all? This I confess is very new and strange Doctrine to me; when a thing once comes to be put into writing, we say it is never forgotten; *Litera scripta manet*.

But then truly they say it is inconsistent with the Honour of the Duke of Albemarle, that he should make this stir and doe about

this

this Will, and pretend such kindness to Mr. Monk, and desire a Title of Honour for him, and yet not intend to revoke this Settlement that stood in the way. The others they say, how is it consistent with the Duke's Honour to intend to revoke it when there was such a Friendship between the Duke and the Earl, so many Services and Obligations performed by the Earl, such a trust and confidence reposed in him even to the last, as it's plain there was? How comes this to pass? But so it is; they are as very much inconsistent I confess. But for persons honours in judging of Causes we have nothing at all to do with them.

For my part I see no reason in the World that the Duke had to alter his mind as to my Lord of Bath, there is no appearance of any unkindness or displeasure conceived by the Duke against the Earl, but an intire trust and confidence to the very last, as is evident by the order of the Keys of the Evidence-Room to be delivered to him when he went away, and to consult with him upon all Occasions.

But withal, I do not know what the meaning of it should be, if he really intended any effect as to the Will of 87, which without all question is well proved; and were it not for this Deed, would be a good disposition of the Estate. Yet tho' it doth contradict the Deed of 81, I cannot but take that to be a very good Deed, and not to be set aside by this Will.

I have nothing further to consider in this Case, nor are we to make presumptions, and then to make inferences from thence. We are to judge upon the Fact as it appears in the Depositions which are plain and clear, and upon these we are to determine our opinions, and nothing else that is Dark, and that we cannot come at further than Conjecture. There have been other things said in the Cause, which I omit on purpose, because I would mention only those that are most material. Upon the whole matter, I am of opinion there ought to be no relief in this Case against my Lord of Bath and those that claim by the Deed of 81.

Conclusion.

Lord Keeper.

I shall first take notice how these Causes stand in Court, and who are the parties in Judgment before the Court.

Here are three Bills, one in which the Dutchess of Albemarle was Plaintiff, and since the Intermarriage my Lord of Mountague is also Plaintiff against my Lord of Bath and others Defendants, and this Bill sets out the late Duke of Albemarle's Marriage-Settlement, and his Will of 87, with the solemnity both of preparing and executing it, and doth complain that the Earl of Bath sets up another Will, and a Deed in 75, and 81, whereby he seeks to frustrate the disposition of the Duke's Estate by the Will of 87. And the Bill doth alledge that if any such Deed was ever executed by the Duke (which

The Case, as it lies in three several Bills.

(which they have reason to doubt and do not admit) they believe the same was imposed upon the Duke by surprize, and not fairly obtained, and by fraud were concealed from the Duke, and ought to be set aside in Equity, tho' the power of Revocation in the said Deed were not strictly pursued, because his intention appears to revoke it, and dispose of the Estate otherwise by making the Will in 87: And if it should not be set aside, then the Dutcheſs ought to have the Lands limited to her by that Deed, and the Rent-Charge of 2000 l. a year, over and besides the Jointure settled upon the Marriage, and confirmed by the Will of 75. And the Will of 87 ought to stand good as to the Personal Estate and Legacies therein; and so prayeth to be protected in the enjoyment of the Personal Estate, and specifieth Legacies given to the Dutcheſs discharged of the Duke's Debts.

There is another Bill brought by Christopher and Henry Monk, which complains of my Lord of Bath, and the others setting up this Will of 75, and Deed of 81; And I think in the same words, or to be sure, to the same effect with the other Bill, and prays that both Will and Deed may be set aside, and the Plaintiffs may enjoy the benefit and Estate given them by the Will of 87.

Then there is a third Bill of my Lord of Bath, Mr. Greenville and Sir Walter Clarges, in which they set out the Will of 75, and the Deed of 81, and the continuance and constancy of the Duke's Friendship and Trust to the time of his Death, and complains that the Dutcheſs and other Defendants set up the Will in 1687, and do pretend that amounts in Equity to a Revocation of the Deed of 81; And this Bill prayeth that the Personal Estate may be applied to pay the Duke's Debts in discharge of the Real Estate, which they pray may be confirmed to the Plaintiffs in that Suit, and a discovery of the Writings about the Real Estate; and that they may be brought into Court, and delivered up to the use of the Plaintiffs.

These Causes were first heard before the Lords Commissioners, so long ago as the 8th of July 1691, then was there a Decree made that the Personal Estate should be accounted for, and applied for the payment of the Debts; but before the Court would deliver any final Judgment as to the real Estate, they ordered a Trial at Law to be had in an Assize, wherein the Dutcheſs and Mr. Christopher Monk were the Lessors of the Plaintiffs, and the Earl of Bath, Mr. Greenville, and Sir Walter Clarges, to be Defendants to try the Title to the real Estate, and the Plaintiffs were only to insist upon the Will of 87, and the Deed of 81, so that as the Defendants Right upon the said Will and Deed might be fairly tried. And all Exhibits were to be left with the Master three Weeks before the Trial, for either side to inspect, take Abstracts and Copies, as they should think fit.

According to this Order, in the Michaelmas-Term after, there was a Tryal at the King's Bench Bar, and upon that Tryal a Verdict passed for the Defendants in the Ejectment, the Earl of Bath, &c. upon the Will of 75, and Deed of 81. After the Tryal, these Causes came to be heard again before the Lords Commissioners, about a Year and a half since: At that Time there was no Complaint made of the Verdict, nor any motion for a new Tryal. But after the Counsel had been heard several Days, the Court took time to consider of their Judgment; and before Judgment, one of these Causes abated by the Marriage of my Lord of Mountague and the Dutchess; and by that and other Accidents, the Cause hath been delayed till the late Hearing before the Court, assisted by my Lords the Judges, who have delivered their Opinions. And now the Causes stand for the Opinion of the Court, upon what appears in the Pleadings and Proofs, and what has been so largely insisted upon on either side.

Upon which, the Verdict being at Law for the Defendants, I must take it as my Lords the Judges have already declared, not only that these Deeds of Lease and Release, of the 15th and 16th of July, 81. were duly sealed and executed by the late Duke of Albemarle, but also that they stand still in force, and unrevoked at Law; for if they had not been so, the Verdict could not have been, as it was, for the Defendants.

Therefore, as that must be taken for granted, that these are good Deeds in Law, the only Matter at present for the Consideration of the Court, is, Whether upon the Debate of this Cause there be sufficient Ground in Equity for this Court to interpose in the Case, so as to set aside these Deeds as not good in Equity, or revoked by the Will of 87, or no: And I shall, as to the Matter of the Question, conclude my Opinion the same way with my Lords the Judges that have delivered theirs before.

The only Matter in question.

And with respect to this Matter, I shall here consider who the Parties are in Judgment before the Court, and what hath been alleged as Reasons and Grounds to induce the Court to set aside this Deed in Equity.

Here is no Purchaser in the Case, no Creditor, no Child unprovided for; but all the Parties claim by voluntary Conveyances on the one side and the other; so that at least they stand equal; or if there be any Circumstances as to the Persons that have any weight, it is on the Part of my Lord of Bath.

There have been several Things insisted upon by the Counsel for the Dutchess and Mr. Monk, as Grounds whereon they would find that Equity which should impeach this Deed of 81: I would mention them as I apprehend they were offered, and I will, as far as I can, avoid being tedious, or use unnecessary Repetitions of what has been already said.

Grounds offered for impeaching the Deed of 81.

First, It has been offered, that this Deed was obtained by Fraud and Surprise.

I.

Or

Secondly,

2. Secondly, If it were originally fairly obtained, yet it was unduly secreted and concealed from the Duke, that he could not come to know the true Contents of his Power; or if it were not concealed, yet it was utterly forgotten by the Duke, which was the Reason and Occasion why sufficient Care was not taken to execute the Power as it should have been.

3. Next, That though the Power of Revocation was not literally executed, yet his Intention appearing clearly to dispose of the Estate otherwise, it ought to be supported in Equity.

4. Then that Deed of 81 was but ancillary (that was the Phrase) to the Will of 75, which being agreed to be revoked by the Will of 87, the Deed must fall with it.

Another thing was, that what the Duke had done amounted to a Revocation.

Then that there was a general Trust, and the Duke remained Owner of the Estate, and might charge it as high as he pleased to the utmost value, and so being absolute Master of the Estate, his subsequent disposition of it by his last Will ought to be made good in Equity.

There are many things accumulated together, and so make the better shew; but it is best to consider them severally, if we would know the true weight of them.

To the first Head.

It is true, it is charged in the Bill that this Deed was obtained by Fraud and Surprise, and that it was concealed from the Duke, or forgotten by him, and he had an Intention to revoke, and went as far as he could; so that they are sufficiently let into this Matter by what is charged in the Bill. But whosoever reads over the Depositions, will see that the End they aimed at, was, to attack the Deeds themselves as false Deeds, and not truly executed; but that being tryed at Law, and the Will and Deeds verified by a Verdict, the Council have attempted to make use of the same Evidence, and read it all, or at least the greatest part of it, as Evidence of Surprise and Circumvention.

Fraud and Circumvention, things not to be presumed.

Surprise, what.

But I think that ought to be well considered by the Court, for we are not to found our Judgment upon that Evidence, which, if it be to be regarded at all, did amount to no more than what was insisted upon, and which is positively contradicted by the Verdict: As to Fraud and Circumvention, it must be granted me, that they are Things not to be presumed; it is all denied in the Answer, and the Proof must be very clear, if it be to be regarded by the Court.

Now, for this word (Surprise) it is a word of a general Signification, so general and so uncertain, that it is impossible to fix it; a Man is surprized in every rash and indiscreet Action, or whatsoever is not done with so much Judgment and Consideration as it ought to be: But I suppose the Gentlemen who use that Word in this Case, mean such Surprise as is attended and accompanied with Fraud and Circumvention; such a Surprise indeed may be a good ground to set aside

aside a Deed so obtained, in Equity, and hath been so in all Times; but any other Surprise never was, and I hope never will be, because it will introduce such a wild Uncertainty in the Decrees and Judgments of the Court, as will be of greater Consequence than the Relief in any Case will answer for.

They say this Surprise was made out two ways, by Matters that appear in the Deeds themselves, and by Circumstances in Proof that arise out of the Deeds.

As to the Matters that appear in the Deeds themselves, they urge,

First, That it is expressed in the Deed of Release that it is made in corroboration of the Will, which is inserted throughout

Objections to the Deed it self.

Then that it is imported to be for the Confirmation of the Will, when in effect it doth fully revoke it, because there are no Limitations in the Deed, but such as vary from those in the Will.

Then that it is for securing the Legacies in the Will, and yet it self defeats the Will.

That as to a great Part of the Estate, the Deed limits it to my Lord of Bath after failure of Issue Male, excluding the Daughters, whereas in the Will that Limitation is after failure of Issue generally.

That the Provision in the Deed for the third Son is ineffectual, because the Duke had not Power to settle it so.

That the Power of Revocation is unreasonably fettered, and the Covenant whereby the Duke, who was then very young, is obliged not to revoke the Will, is a derogatory and illegal Covenant.

And the unskilful Phrase and Language of the whole Conveyance must be a Demonstration that Sir William Jones was not employed in it, as is pretended; these are the Objections to the Deed it self.

Now as to the Misrecitals, as my Lord Chief Justice has said, they will have no Influence upon the Limitations, because the Recitals in a Deed are not made the Measure of the Limitations in it: Besides, as I apprehend, here are none of these Misrecitals which are of that nature, as to draw on the Duke into a Mistake in the favour of my Lord of Bath, for the Recital that the Dutchess had a much greater Estate by the Will than she had before, as the Limitation of Dalby and Broughton for Life, when it was but during Widowhood, this might lead the Duke indeed into mistake in favour of the Dutchess, as it did, and might have induced greater Limitations of the same kind, but never to the advantage of my Lord of Bath, who was to come in Remainder; so that all the Inference that can be made from those Misrecitals, is only that Sir Thomas Stringer, who (it is apparent in Proof) drew the Deed, was a careless Man.

Answers.

Then they say the Variation of the Limitations from those in the Will, sheweth that it was to revoke the Will, and not to confirm it; as to that,

First,

First, Such Variation is a Proof that the Duke, between the time of the Will, and the time of the Deed, had altered his Mind as to those Particulars; but to carry it further, I see no Reason in the World.

Next it hath been observed, that the Words of the Deed which purport the End of it to be for the Confirming of the Will, must plainly in Reason infer to the principal Designs of the Settlement, which was to dispose of his Estate to my Lord of Bath, and the nearest of his Relations, and not to refer to any particular Limitation in the Will; and that it doth so confirm the Will, as to the main principal Limitation of the Will, is plain; and it doth appear by the very phrasing of the Deed, that besides the confirming of the Will, he did mainly design the settling of his Estate.

Then let us consider the Differences in point of Limitation between the Deed and the Will.

First, They say in the Deed, there is an Estate limited to the Duke for Life; which is not in the Will, that is proper in a Deed, but would have been absurd in a Will which is not to take effect till after his death.

Then for that Variation in the Limitation to the Dutcheſs, it is not material in point of value, but for duration to the Earl; and it was a reasonable thing so to make it; for since he did intend to charge his real Estate with great Legacies, it had been impossible to have sold any Part of it that had been under a Rent-charge of 6000 l. and therefore it limits Lands of that value.

As for the Limitation of Norton-Disney, which indeed is to the Advantage of my Lord of Bath, and is the only Variation from the Will which is so; for with respect to the Essex and Northern Estates, my Lord has but a Remainder after failure of Issue in general, but in this it is after failure of Issue Male. But then it is to be considered, that the Honour would fall upon the Duke's death without Issue Male, and he did intend and desire that the Honour of Duke of Albemarle should come to my Lord of Bath: His Father had gone so far in it, as to procure a Promise of it under the Sign Manual by King Charles the Second, and at the same time he had an Estate of 15000 l. a Year; and then it became him well that such a Part of the Estate should go with the Honour.

As to that Objection, That thereby there was no Provision made for Daughters, it were indeed a very great one, if indeed there were no Provision at all for them: But it means no more than that if he left no Sons, there would be an ample Provision out of the rest of his Estate for Daughters; and so in effect it is upon the Marriage Settlement and the Will of 87; so that if it be an Argument of Surprise as to the one, it is the same as to the other.

Then for that Provision that is made out of Rotherich and Norton-Disney, for the Third Son, it must be admitted, that as to my Lord Duke's Mind in the Matter, it would be ineffectual; but there can be nothing inferred from thence, but that there was a great

Neglect of looking into the Settlement : But that will be no Ground in Equity to relieve against this Deed ; for if it should be so, how many Settlements must we set aside upon Mens settling that over which in part they had no Power of making such Disposition, because the Persons concerned in drawing the Settlement, did not take sufficient Care in every Particular, to pursue the Power he had who makes the Deed ?

Besides, there is the same Mistake in the Will of 87, in relation to Potheridge, where the Barony for Mr. Monk was to be fixed, it being by a Settlement in King Charles the First's Time so settled in Tail, that it could not, or was not legally to be disposed of by Will.

Indeed it was said that there were some Articles made with Pride about that Matter to carry the Estate according as the Duke should direct ; but those Articles cannot answer the Objection, for they were made three Months after the Will, and then they were made with a wrong Person, and so signify nothing.

It has been objected, That this Deed pretends to be for securing Legacies in the Will of 75, but defeats them : That is a Mistake in the Objection ; for it confirms the Will certainly as to the Legacies, and doth create a Trust for performing and paying them : Indeed by a subsequent Act, (viz.) the Will of 87, there may be an Alteration made ; but that is no Argument against this Settlement it self.

There was another Objection made, and that was, That the Power of Revocation was unreasonable, especially back'd with such an unreasonable Covenant not to revoke : But as to that, it is to be considered what the Design of this Settlement was ; he had made his Will before, but he thought himself unsafe under that Disposition ; he was under Apprehension of being applied unto, and importuned to dispose of his Estate otherwise than he had a mind it should go, therefore he intended this Settlement as a Guard against any Surprise of that kind ; and that being his Intention, if it had been only a general Power of Revocation, it had been no more than what any Will or subsequent Act done by him would have effected, but that had not answered his Meaning.

And so as to the last Covenant in the Deed, which they call the Derogatory Clause, whereby the Duke covenants not to revoke the Will otherwise than as aforesaid, I take it, that doth import no more but that as to the preceding part of the Deed, he guards himself against Surprise as to the Real Estate, so he doth here as to the Personal Estate. And though it prove ineffectual at Law, that is not material as to the Intention of the Duke.

The last Objection upon the Deed, is, the penning it, which is an Objection that is to go through the whole Deed ; but this Objection goes further than the Point for which it is alledged ; for if it prove any thing, it proves it to be a false Deed : But for this, I do not find it so much as suggested that this Deed was

H. h

drawn

drawn by Sir William Jones; my Lord of Bath indeed says, that it was left to the Care and Conduct of Sir William Jones; but as to what appears, he was only concerned in the Proviso: For it is very good Reason to believe, when he says [I approve of this Proviso] he did not refer his Opinion to any other Part of the Deed: And indeed any one who knew or remembered him, will think that he concerned himself with no other Part but what he set his hand to the Approbation of.

I have taken notice of those Objections and Arguments urged by the Council, which, taken altogether, should induce their Ground of Equity from a Surprise in obtaining this Deed; but when they are severally considered, they seem not to be of such weight as is contended for.

But if the Objections had been more in number, or of greater Consequence, yet let the Deed be never so ill drawn, and the Mistakes and Misrecitals never so many, and the Differences of Limitations in the Deed from those in the Will never so many too: Yet if this Deed were really executed by the Party, all this will not be a sufficient Ground in Equity to set aside this Deed. And the Council for the Plaintiffs were very well aware of this, and therefore they go to other Circumstances out of the Deed, to shew this Surprise; and, as far as I can observe, the Objections upon this Point are these:

Other Objections from Circumstances out of the Deed.

That there is no Proof of any previous Direction for drawing of this Deed, there is no Proof of the Draught or Deeds being read to the Duke, no Counterpart was executed, the Trustees were not acquainted with it; there was an Estate limited to Sir Thomas Clarges, when there were great Differences between the Duke and him; it is not subscribed by the Duke's Council, as all Deeds executed by him used to be; that it was not ingrossed according to the Draught, and that in a very material Place; for if it had been according to the Draught, the Duke had been Master of the Estate by a general Trust; and if it were not perused by Sir William Jones, or he was not a Witness to it, then so far as Sir William Jones was surprised in the Matter, the Duke was so too.

Answers.

Now as to the want of Proof of any previous Directions for this Deed, that is not strange after such a length of time; Sir Thomas Stringer, who drew it, is dead; four of the Witnesses to the Execution of it are dead too: But the Presumption is very strong, when the Draught is of Sir Thomas Stringer's Son's Hand-writing, and corrected and interlined by his own hand in several Places; that he had Orders and Directions from the Duke to prepare such a Deed.

The reading or not reading the Deed to the Duke, doth not appear; it might be read to him before, and it was not necessary it should be read to him at the time of executing; if it were, then the Will of 87 lies open to the same Objection, for that was not read to the Duke when he sealed it.

As to that Objection, That there was no Counterpart, nor the Trustees acquainted with it, that can be nothing of an Objection; for the Deed remained in the Duke's hands till a little time before his going to Jamaica, as appears by my Lord of Bath's Answer, which hath not been falsified as I know of in any point; nor was there any Occasion to give Notice to the Trustees, because there was no manner of Estate or Trust lodged in them. But my Lord of Bath was the only Person that had any Trust in him by the Deed, therefore there was no Reason that it should be known to any one but him; and the nature of the thing, and all the Proofs, shew that it was intended to be concealed.

Then as to the Story of Sir Thomas Clarges, and the Differences between the Duke and him, there is no Proof of it; it is at most but an Hear-say, testified by one Witness.

That it was not subscribed by the Duke's Council, as all his Deeds usually were, it seems to me to be of no very great weight, when the Draught appears under Sir Thomas Stringer's Son's Hand, interlined and corrected by himself, and Sir William Jones a Witness to the Execution, and present when it was compleated; sure that can never signify any thing.

As to the other Objection that was made, That the Deed was not ingrossed according to the Draught, and the Variation is in so material a Part, as to make the Duke Master or not Master of the Estate, it should be considered, first, That upon view of the Draught it is plain, Words have been cut off. and there is a positive Witness who swears that he twice ingrossed the Deed by the Draught; it is possible that a Man may twice leave out the same Words in ingrossing a Deed by a Draught; but that he should twice add the same Words that were not in the Draught, is very strange, and not easily to be believed.

Then say they, This is not the Draught that was first perused and approved of by Sir William Jones: That is certainly such an Objection as never was made before; and indeed it is likely there never was Occasion to make such an Objection till the last Hearing; for it may be it was not cut till then: But pray let it be considered for whose Interest it was to have this Draught cut or altered from the Ingrossment: It is impossible it should be cut off for the Interest of my Lord of Bath, by the Objection that ariseth from it; for let any Words in Nature have been there, they could not have been of such Disadvantage as they would have it to be: However, be the Alteration of the Draught what it will, if it were not done by the Defendants, nor was for their Interest to be done, nor done before the Execution of the Deed, it all signifies nothing.

But I think it is fit and proper here to say something to that Motion, that where the Council is surprized that is a Surprise upon

Sir James
Herbert's and
the Earl of
Pembroke's
Case.

Tenant for
Life, the Re-
mainder to
the Heirs of
his Body, the
Law vests the
whole Estate-
Tail in him,
and he may
dispose of it.

upon the Client: I take that to be a Matter of very great Consequence, and I fear it would shake most of the Settlements of Estates in England: And for that I would mention the Case of Sir James Herbert, and the late Lord of Pembroke. There was a Bill brought in this Court to set aside the Will of the Elder Brother, who was the last Earl of Pembroke but two; Sir James was Heir at Law, and the other was but half-Brother.

The Earl had taken a Displeasure at his Brother, and sent Directions to Mr. Swanton to draw a Will and Settlement of his Estate, and amongst other things orders, to be sure that the Brother should have no Power over the Estate to dispose of it; and because that in his Grandfather's Will there was such a Settlement as he liked of, he sends him that: Swanton makes a Will, and limits an Estate to Sir Philip Herbert the Brother for Life, and the Remainder to the Heirs of his Body; this Will is brought by the Council to the Earl, and read, and executed, and held to be good: Yet this was a notorious Surprise upon the Council; for nothing is plainer than that the Council had made a Mistake, or knew not the Law: He did not, at best, consider, that upon such a Limitation, the Law vests the whole Estate-Tail in him, and he may dispose of it.

It is plain he had not pursued the Will of the Grandfather; but yet when this Cause came to be heard before my Lord North, when the Will appear'd to have been truly executed, the Court declared it was a Misfortune that they did not go to a better Council: And it was sent to Law to try whether it was the Will of the Earl of Pembroke or no; and it being found to be the Earl's Will, the Bill was dismissed with Costs.

Thus I have taken notice of what has been offered to prove the Surprise; I would shortly mention on the other side, what hath been insisted upon to shew that there was nothing like Surprise, but all was done upon a very good Ground, and pursuant to a settled full Purpose, continued for so long a Tract of Time to the Duke's Death.

First, say they, it doth appear there was a very near Relation between my Lord Duke and my Lord of Bath; And that Duke George owned he owed his first setting-out in the World to the Ancestors of my Lord of Bath: It doth plainly appear there was a most particular Friendship and mutual Confidence between them, in Matters of the highest Nature, and chiefest Concern; nay, that this proceeded so far on my Lord of Bath's side in Duke George's time, that he prevailed with King Charles the Second to promise, under the Sign Manual, and recommended it to his Successors, to create my Lord of Bath Duke of Albemarle, if there were a failure of Issue by the Duke.

Then that this Friendship did continue between Duke Christopher and my Lord of Bath, is plain beyond all Controversy, for it began upon a very good Foundation; that is, whereas the Charter should have been given to the Earl of Bath, he prevailed to have it returned

to the young Duke, and it continued so much all along, that there was nothing of moment relating to the Duke's Affairs, in which the Earl was not mainly concerned; and all this is proved by a Series of Letters, continuing down from the Death of Duke George, to the death of Duke Christopher.

In 74. he sends him Word he had pursued his Advice, and his Advice should always be very prevalent with him.

In 75. he tells him, he expected to see him with great Impatience, because he was not able to go on in the Regulation of his Family without his Assistance and Advice; that he had finished his Will, and would make all more perfect when he came to him: It should seem his former Will was trusted in my Lord's Hands; and when that was returned or brought up, in a few Days after this Will of 75 is made; and by that all the Estate, or the main of it, is given to my Lord of Bath. And it was the first Will that he made, I think, after he came of Age, and had any Power to dispose of his Estate in Land; and thereby, as I said, he deviseeth the Bulk of it to my Lord of Bath: He always desired, as the Will declares, that in case he had no Issue, the Earl might succeed him in his Honours and Estate, as well out of true Affection to him, as his nearest Kinsman on his Father's side, as out of due Gratitude for the many Acts of Kindness and Service done by the Earl, beyond all the rest of his Kindred and Friends, upon which he humbly desires his Majesty to confer the Dukedom upon him, and that the eldest Son of the Earl, and so successively, the eldest Son of the Family, should be called Lord Monk, to preserve his Name and Honour in Memory of his Father and of himself. There cannot be Words that express more Kindness and Respect, and Intention of Advantage, than are here used.

There was an Attempt by Proofs in this Cause to shake the Credit, even of this very Will; but when the Council on that side came to speak to it, they could produce no Proofs that would at all come near it: It is plain then, that at this time, no Man could have more Kindness for another, than the Duke had for the Earl.

In the Year 1678, there appears the same Sense in the Duke, of the Earl's Friendship by his Letters, and the Obligations of Gratitude he had to him; that he had no Friend in whom he could confide but himself, and desiring him to come to assist him in the Management of his Affairs; that his Kindness and Friendship was never to be forgotten, without the highest Ingratitude.

All this is a sort of Evidence, against which there is no opposition to be made; so it is also continued to the Year 80, when he sent him Word of a Servant's Death, and desired him to secure his Papers and Accounts.

Thus it stood to the time of making that Settlement, and while the Duke and he were upon such Terms with one another, it was no strange thing that he should make such a Deed as this, and the Manner both of preparing and executing it, seems far from having any thing of Surprize in it.

To the 2d
Head.

Then the next thing that hath been urged, was, that this being a Settlement under a Power of Revocation which he intended to make use of, it was secreted and concealed from him, so that he could not know what his Power was; and several Cases were put, where a Man in such Circumstances, knowingly suffers a Purchaser to go on with his Bargain, he shall not have any Advantage by such a concealed Settlement, those Cases were all admitted to be good, and particularly that mentioned by Mr. Baron Powel, and my Lord Chief Justice Treby, the Case of Mr. Clare: And I think truly I need go no further, than to say that there is no Resemblance between that Case and this, that is, where a Purchaser is concerned, and the Person that conceals the Deed, suffers the Purchaser to proceed without giving him any Notice.

If indeed there had been a full and clear Proof, that the Duke had a real Intention to Revoke this Deed, if he could have known what he was to do in order to it, and had been hindered by the Fraud and Contrivance of any Person concerned in it, in Point of Advantage; and if by such Concealment it was impossible for him to know the true Circumstances of his Power, that would have made a different Consideration in a Court of Equity; but there is no Proof, that these Deeds were ever in the Hands of my Lord of Bath, till some little time before the Duke went beyond Sea, when the Duke delivered them to him.

For as to Aleman's Deposition, that was but a Delivery upon Execution, and not a Delivery for Custody.

And my Lord of Bath in his Answer says, he had not them till then expressly; so that as far as that goeth, it is all the Evidence you have where the Deed lay all the while; and his Answer is fortified in this, by what Mr. Courtney says, that my Lord told him when he came to him, that the Deed it self was in the Hands of the Duke; and he had received the Draught from the Duke to advise upon; And it is further verified by two material Facts, by the Abstract that was taken about some two Years before by Sir Thomas Stringer, and by what is admitted on all Hands, was by my Lord of Bath delivered up when the Will of 87 was preparing; and that the Will of 75, and Deed, being produced together under the Duke's Seal, after his Death, it is to be taken that both together were put under the Cover, and Sealed up by the Duke, and delivered to my Lord of Bath, as he himself says in his Answer: There being then so much Ground to believe that the Deed was in the Duke's own Hands, what Obligation should there be supposed to lie upon my Lord of Bath to make any mention of it to him;

him; it was always intended to be a private thing, that is plain; there is no Proof what the Purposes of the Duke were in making the Will; the Purport and Effect of the Thing speaks it self.

But my Lord of Bath says, that upon the Selling of Dalby and Broughton to my Lord Jefferies, he did give the Dutches a Caution not to be so earnest for finishing the Bargain, for she might be a loser by it; which could mean nothing, but that she had an Interest in it by this Deed.

As to the Objection, that my Lord of Bath stood by and saw that Purchase made, and gave no notice of this Deed to the Purchaser: I confess, had my Lord of Bath set up this Deed against, and to overthrow that Purchase, that would have brought it up to the Case of Wraw and Ford; but every body knoweth, that a bare voluntary Settlement is of no force against a Purchaser without Notice; and as to the Leases and Grants of Annuities, there is no Proof that ever my Lord of Bath knew of them.

A voluntary Settlement of no force against a Purchaser without Notice.

Then it was objected, that though it go not so far as a purposed Concealment, yet the thing was out of mind, and the Duke continuing Owner of the Estate, and acting as Owner, though not with all the Circumstances required, those Acts done by him as Owner, are to be supported in a Court of Equity; this seems a hard Demand, for a voluntary Devisee to crave Relief against a prior Settlement with a Power of Revocation; because he that made that Settlement had forgotten it; there is no Precedent to warrant a Decree of that nature, nor is there any Pretence of Reason for it; for betwixt two Persons, each of which claim by a voluntary Settlement, the Matter stands upon an equal foot, and there is no possibility of an equitable Consideration to assist the one against the other.

Where two Persons claim by two voluntary Settlements, the matters stand upon an equal foot.

And if there were any Ground for it, as a Notion, there were no room for any such Notion as to the Proof in this Case; for it is founded upon a Supposition that the Duke of Albemarle had forgotten the Settlement, of which there is no Proof, but only an Argumentative one, drawn from his disposing of his Estate another way and manner, But that he had not forgotten it, besides the Answer of Mr. Greenville and Sir Walter Clarges, there are other Things to be said:

And as to their Answer, I take it no Decree can be made against a Man's Answer upon the Proof of one Witness; why then should a Decree be expected against a Man's Answer where there is no Proof to the contrary at all?

No Decree can be made against a Man's Answer upon the Proof of one Witness.

Sir Walter Clarges (upon somewhat that had been told him of the Duke's Intentions towards him by his last Will) as should seem, took the Liberty to complain to the Duke, and seemed much discomposed; but the Duke bid him not be concerned at what Stringer said, for he had otherwise better provided for him; now there is no other Provision but what is by this Deed.

Mr.

Mr. Greenville addressed himself to the Duke, to thank him for what Kindnesses (Sir Thomas Stringer acquainted him) he had shewn him in his Will; but the Duke replied with some Reflection upon Sir Thomas Stringer, (who pretended to have been very instrumental in it) that he had never moved him in it, but that he had taken care of him, and his Brother would tell him wherein; and if he would, he might tell his Brother he said so: And he swears he did go to his Brother, my Lord of Bath, who told him the Duke had indeed provided for him, and settled a Part of his Estate upon him; but that if the Duke had not allowed him so to do by sending him to him, he would not have told him of it.

All this is a full Proof, that the Duke had not forgotten this Deed at that time; but it cannot be believed, that the Duke had ever forgotten this Deed, without disbelieving several Acts that have been substantially proved to be done by him; as when upon my Lord Lansdown's Marriage, his Letters do particularly take notice of a general Interest he had in him, and seems expressly to refer to this very Deed, as being so much concerned in his good or ill Fortune, as my Lord of Bath himself very well knew; and congratulating the Match with my Lord Treasurer's Daughter; he goes on to desire, that as he had taken care to marry him well, so he would have great Regard to his Education; which he did mind him of, remembering still, that he was most concerned in him, of any one, except himself, as he very well knew. This could refer to nothing but some Settlement of his Estate, and none appears but this.

There seems to have been some Attempt to interrupt this Friendship and amicable Correspondence between the Duke and the Earl; for by a Letter dated, as I take it, 31 Jan. 81. the Duke says, his Kindness and Friendship shall always be the same; and all the malicious Endeavours of ill People shall not be able to break the Link between them; so that it should seem, there were malicious Endeavours used to sow Differences between those noble Persons; but by whom, is not apparent in the Proof.

But still there is a continued Series of kind Letters between them, which goeth on even to the time of making the last Will in 87, as full of Gratitude (all the Duke's Letters, great Numbers of which were produced) as can be, for his continued Services and Kindness; nay, down to the time of his going to Jamaica, and while he was there. Now it looks to me very strange, that the Duke should all this while be receiving Obligations, and owing them from my Lord of Bath, and yet must be supposed to have forgotten what he had done in Acknowledgment and Recompence of these Services. Then there is besides all this, the positive Testimony of Mr. Crofts and his Wife, both swearing particular Declarations from the Duke's own Mouth, which can have relation to nothing but this Deed.

There is indeed one thing that is urged as a strong Argument, the Duke intended to alter this Settlement, that is his taking

such formal Steps in preparing and drawing this last Will, his abiding with my Lord Chief Justice Pollexfen, and so much Solemnity as was used in having the Parts of it ingrossed and delivered with such Ceremony to three several Hands, It is, they say, hard to imagine he would do all this with a deliberate Intent that it should all signify nothing as to his real Estate, and so quit the World with a great deal of Pageantry and Ceremony to no purpose.

Now it must be owned, that it doth seem a strange Part in the Duke, and the World must be surprized at it; for it is impossible to make the Duke's Affairs of a piece, and reconcile such Contradictions: He cannot indeed be cleared from Prevarication; he did certainly intend to deceive the Dutchess, or my Lord of Bath: It is most evident he did keep my Lord of Bath in Hand, that he should have his Estate; for the Testimony of Mr. Prideaux, and other Witnesses, concerning the Duke's Declaration of his intending to settle, and having settled his Estate upon him, we find by this Deed his Estate is so actually settled, and that Hind continued till 81; and it appears by Letters, as well before as since, that Duke Christopher intrusted him in all his Affairs of Consequence, acted not in any thing but with his Assistance, continually made use of his Friendship at Court, to the time of his Death: When he was dissatisfied with any of his Servants, my Lord of Bath was the Man that must settle the Matter; when he was to purchase, my Lord of Bath must buy for him; when he was to sell, my Lord of Bath was to transact the Matter; when he wanted Money, my Lord was to procure it for him; when he was in danger of losing Money, my Lord is applied unto to prevent it. All this appears by the several Letters that have been read and produced. When he was gone to Jamaica, and any Request at Court, my Lord's Interest was that which he relied upon; my Lord of Bath was the single Trustee to be applied to chiefly in what concerned the Estate, the Keys of the Evidence-Room were to be deposited with him, as being principally concerned if he should miscarry.

Now it must be confessed a Man may do as much as all this comes to, and make use of another Man's Friendship, and not design to give him his Estate, when he had once firmly settled it so, and repeated his Assurance of Kindness, and continued to make Profession of Kindness all along to the time of his Death, and went on to make use of his Service, because he thought he might freely command the Service of one who expected to have such Advantages from him; yet then I do not see but that it must be admitted, that he did deliberately design to impose upon my Lord of Bath; or if he did not, he did intend to impose upon my Lady Dutchess. Now be it which it will, I do think he is not to be excused in reference to the Point of Honour, as to the Request made to the King for the Earl of Bath, and in pursuance of Duke George his Desire, who engaged the late King to promise under his Sign Manual, and he hath made the same kind of Request for Mr. Monk.

Now upon the whole Matter, whether this Will of 1687 was made to free him from some Importunities in his Family, is a great Question. There are some Proofs in the Case that greatly look that way: It is plain he did not execute it for several Months after it was prepared and drawn; and when it was published, it was obtained with great Importunity against his Inclination at that time; and there doth not appear any Intention that it should revoke this Settlement, but on the contrary, it should seem he did not intend so; for there are no Witnesses called to the Will, but the same that came with Stringer from Newcastle-House to that purpose: But whether he did intend it should take effect, as to the Personal Estate only, or to delude my Lord of Bath, which way his Honour is best saved, is not at all to our Purpose to consider, upon the Case before us in Judgment; though I must say, take it one way or the other, he seems to blame, and to have dealt in some sort double.

The 3d
Head.

The next Thing insisted upon is, That this Deed is revoked in Equity by this Will; and though the Power be not pursued in all the Circumstances, yet his Intention appearing to make this different Disposition of his Estate, a Court of Equity should supply that Defect.

A Power of
Revocation
shall not ex-
tend further
in Equity
than the Law
will carry it.

Now I take it for granted, that a Power of Revocation shall not be carried further in a Court of Equity than the Law will carry it; the Law hath been liberal in expounding Powers of Revocation favourably; and where the Law expounds a thing according to an equitable Constitution, there is no Reason for Equity to extend it further.

Where there appear to be other equitable Considerations, it may have another Judgment; but if it stands without any Mixture of other Considerations, I think it would be very hard to break through a Settlement, especially so solemnly made, that he thought fit to restrain himself from altering it, without the Assistance of so many Noble Persons, whenever he would make use of the Power thereby reserved to him; I say, it would be a very strange thing for a Court of Equity, without the Mixture of any other Considerations, to assist another voluntary Conveyance against this.

The Case of Arundel and Philpot is a full Authority in this Case, and it has been so often repeated, that I need not mention it any further.

As to what was insisted upon by some about the Revocation, being compleated as to the Number of Witnesses, by the Publication in Jamaica, and the Impossibility of having any Peers there; I must confess, had the Duke in Jamaica had an express deliberate Intention and Purpose to revoke any Acts to testify it, and gone as far in pursuance of the Circumstances as his Condition in those Parts would admit, that might have come in within that Foundation of Equity (to wit) Accident.

But I think there is no Ground of Proof of any such Intention or Action; for the Proof amounts to no more than this: The Duke, to prevent any troublesome Applications to him, shut up himself in his Room, and those that came to him were to come in at the Window; and a strong Box, in which his Papers were, standing under the Window, by frequent treading upon it, he had a Suspicion that there had been some Attempts to force and open it; whereupon he calls for the Box, to open it, and out of it takes several Papers, which he read, or gave to Dr. Sloan to read, several Letters, as I remember, and afterwards he took up a sealed Packet, and said to the Doctor, This is my Will, and put it down again: Is this any manner of Proof in the World, that this Act was done animo testandi? Much less is it any Proof that there was any notice taken at this time of this Settlement, or that he would avoid it.

I would say something to that other Point, that this being a Deed made to confirm and corroborate the Will of 75, is but Ancillary to the Will, and depends upon it, and is to stand or fall with it, and upon the Revocation of that Will did fall with it. The 4th Head.

This is an Objection wholly inconsistent with the other Arguments that are used against this Deed, that it was by Surprise; for by those Arguments they would destroy the Deed, as inconsistent with the Will; but now the Argument is turned the other way. But my Lord Chief Justice Holt has so fully and clearly answered that Matter, that I shall not need to trouble you with saying any more in it: The Cases cited about it are in no sort applicable to this Case.

The last thing insisted upon was, supposing the Deed to stand good, yet there being a general Trust raised in it to pay the Legacies in the Will, my Lord of Bath was no more than a Trustee, and the Duke continued Master of the Estate; and he who had such a general Power to charge the Land, might do it to the full Value, and then consequently might dispose of the Land too.

Now this Point of Trust is the proper Subject of a Court of Equity; but to expound a Deed which is made on purpose to prevent a Descent upon the Heir, and then to make a general Resulting Trust to let the Heir in, is such a Construction as will apparently contradict it self and the Deed. But that will fall out to be a Point that comes to be considered hereafter, how far this may be a Trust in my Lord of Bath to answer Legacies or Debts in case the personal Estate should fail short; it is not properly considerable now. A Trust the proper Subject of a Court of Equity.

The only Point that was spoken to by the Council, and left for the Judgment of the Court, was this, whether in this Case here were sufficient Matter for a Court of Equity to interpose so far as to set aside or impeach this Deed of 81. Now as to that Matter, I think I have the Concurrence of my Lords the Judges in it; and I am of Opinion, that there doth not appear sufficient Ground upon this Case for a Court of Equity to do any such thing; therefore I declare my Judgment: Conclusion upon the sole Point.

That

Decree.

That as far as my Lord Mountague, and my Lady Dutcheſs, and Mr. Monk, their Bills pray, that the Court will interpoſe to ſet aſide this Deed, ſo far their Bills ought to be diſmiſſed. As to any other Matters that ariſe in the Caſe, I ſuppoſe there will be Time taken to ſpeak to them: But this is the only Matter in Judgment before us at preſent.

In

In Cur. Cancel.

Lord Chancellor *SOMERS*,

Lord Chief Justice *HOLT*,

AND

Lord Chief Justice *TREBY*.

Bertie & Ux. cont. Dom. Faulkland.

Term Hil. 9 Will. III.

THIS Case was: Mr. Carie being seised in Fee of the Manors and Lands in Question, upon the 10th of September, 1685, makes his Will, and thereby deviseth the said Estate to Trustees therein nam'd, and their Heirs, and directs the Trust thereof to be to the Trustees and their Heirs in Trust for Mrs. Willoughby (who was also Heir at Law to Mr. Carie) for her Life, in case within three Years after his Death she lawfully married the Lord Guilford; and in case the said Marriage should take effect to the eldest and other Sons of Mrs. Willoughby by the Lord Guilford in Tail-Male; but if no such Issue were had, or in case the Marriage should not take effect within three Years after the Death of Mr. Carie, then the Trust was devised over to the Lord Faulkland: After, the 20th of the same Month, Mr. Carie reciting the Bequest to Mrs. Willoughby, makes a Codicil, and thereby declares it to be his Will, That if the said Marriage betwixt the Lord Guilford and Mrs. Willoughby took effect before the Age of Consent of both or either of them, it should be of no Avail or Signification, unless it were confirm'd by both Parties at their Age of Consent. After, in October following, Mr. Carie died, and divers Transactions were betwixt the Guardians of the Lord Guilford and Mrs. Willoughby and her Friends, about the Marriage, who insisted upon Terms, and a Settlement of a Proportion of the Lord Guilford's Estate upon her: But the Lord Guilford did never make his Applications to her about it, but the three Years after Mr. Carie's

Lord Chief
Justice Holt's
Argument.

Death did expire : Several Proposals, within the three Years, were indeed made by the Friends of Mrs. Willoughby to the Lord Guilford's Guardians, but not accepted of by the Guardians of the Lord Guilford ; and the three Years after Mr. Carie's Death being elapsed, the young Lady married the Plaintiff.

The Question was, Whether this appearing to be the Case, and no Default or Neglect appearing in Mrs. Willoughby, who, as was urged, pressed the Marriage as far as the Modesty of her Sex would allow of, she shall not have the Aid of a Court of Equity ?

And this doth arise upon the Construction of the Will ; divers Things indeed were mentioned by Counsel, and Proof was made of divers Discourses and Letters had passed by Mr. Carie, expressing a Kindness to Mrs. Bertie (then Mrs. Willoughby) his Niece : But all those, and other the Evidences that were produced, were to be rejected ; no notice being taken of them in the Bill to which they ought to be confin'd : Besides, such Matters, neither before nor since the Statute of Frauds and Perjuries, would controul the Will ; or if they would, yet the Will and Codicil being the last Act of his Life, doth repeal all his other Acts.

He thought, upon Consideration of the Will, there could be no Relief :

1. First, Because the Estate was given to Mrs. Willoughby upon a Condition precedent, which was, That if she should be married to the Lord Guilford within the Time appointed, it is given to her ; and such is the nature of a Condition precedent in Point of Law, that no Action interposing can be Ground to relieve upon, if it be not performed : So that being a Condition precedent, although the Lord Guilford had died within the three Years, and so the Condition had become impossible by the Act of God, it could not have helped the Lady. It will not be easie in a Court of Equity to shew any Precedent of a Relief in case of Conditions precedent, as often happens in Cases of Conditions subsequent ; which not being favoured, because they go in Defeasance of Estates, this Court may relieve if it be performed in the substantial Part, tho' some of the Circumstances be not pursued.

2. The Second Reason is, Because it is not only so in point of Law, but also by the express Declaration of Mr. Carie the Testator. It was his Purpose that the Marriage should take effect, for he doth not give her the Estate upon any Act in her own Power. It was limited to her in case the Marriage took effect, to which there was to be the Consent of the Lord Guilford, as well as of the Lady ; the Marriage was appointed to be within such a Time, or else the Estate to go over to the Lord Faulkland ; besides the Addition of the Codicil, although they should marry within Age ; yet if both Parties did not confirm the Marriage at their respective Ages of Consent, it was the same thing, and the Lady to be excluded.

3. The Third Reason is, Because it doth appear by the Will, that the actual Marriage of the Lord Guilford to the young Lady Mrs. Willoughby,

loughby, was the only Consideration of the Gift of the Estate; for he had a great Kindness for the Lord Guilford, and doth not give it to any Heir that the Lady should have, but only to her Issue-Male by the Lord Guilford.

It was urged, that Mrs. Willoughby was Heir at Law, and therefore every thing should be construed beneficial to her; to which it may be confessed, that Heirs at Law are much favoured, if the Words in a Will are ambiguous: But that Rule shall not extend to defeat an Interest well vested, when the Words of the Will are very express, and the Construction can admit of no doubt.

It was also insisted by the Plaintiff's Counsel, That if the Lady should by the Will have an Estate for her Life, a Decree should also be in favour of her Issue by the Plaintiff Mr. Bertie; but for that there can be no Pretence, it being so very contradictory to the Will, and the Intention of Mr. Carie.

Then it is evident, that as the Testator design'd a Kindness to the Lord Faulkland, so he had a Respect to his own Name, and more inclin'd to support that than the Lady's Interest; for had he had any great Respect to the Lady, he would not have put such hard Terms upon her: He hath not given it to her Heirs-Male in general, but such only as she should have by the Lord Guilford; he only gives her a Conditional Estate for Life, when otherwise after his Death she would have had the absolute Inheritance; and so the Will is so far from being to her Advantage, as to amount to a Disinheritance of her who was the Heir at Law to Mr. Carie the Testator.

This being the State of the Case, what shall a Court of Equity do? Shall it give her the Estate, tho' married to another Person? This is not within the Words of Equity of the Will, but in express Contradiction to both of them: If the Estate indeed be upon a subsequent Condition, Equity may interpose, where the Substance is perform'd, tho' not in every matter literally pursued; but where it is in no Part performed, as in this Case, it can never help.

There was a Case cited between the Substance whereof was, That R. by Will devised an Estate to H. P. upon Condition that he should convey Two Thirds of it over to another; which if he did not do, the whole was to go over to a third Person: He did not exactly convey over these Two Thirds, but did convey what was equal in value to the Two Thirds; and allow'd good, because 1000 l. is as good in one Place, as in another; but had it not been performed, and the Value of the Two Thirds convey'd, it must have amounted to a Destruction of the Estate.

The Case of Fry and Porter in this Court, is much stronger than this Case: For there the Lord Newport devis'd Newport-House to his Lady for Life, and after to his Grandchild Ann Knowles, and to the Heirs of her Body, upon the Condition that she married with the Consent of his Wife, and the Earls of Warwick and Manchester, or the major Part of them; but if she married without such Consent,

1 Mod. Rep.
300.

c?

or died without Issue, then he gave it to Geo. Porter. After the Devisor died, the young Lady (not having notice of the Will) married without the Consent of any of the Trustees. The Estate was forfeited in Law; and after, in this Court, by the Advice of two Justices, and upon a great Debate, it was held, she could have no Relief; altho' she was an Infant, and had no notice, and consequently did not know that she was under the Obligation of having the Advice and Consent of the Trustees; but yet she lost her Estate, and could not have any Relief. That can't be pretended in this Case; for this Lady was acquainted with it, she had notice, and was willing to comply with the Marriage.

The Case also of my Lord Bath and Mountague was cited, to shew how the Terms on a Power of Revocation ought to be pursued; for those Persons that derive an Estate from another, must take it upon those Terms upon which it is conveyed.

It was objected, That this was a Trust, and this Court may qualify a Trust, and dispose of it in a different manner than of Estates. To which it was answer'd, That this Court hath as great a Power upon an Estate as upon a Trust, and may as well transfer an Estate as it may a Trust: It is the Ground of Equity, in one Case or the other, that entitles this Court to its Jurisdiction.

This Lady was under this further Difficulty, That if three Years were elapsed, and the Marriage between her and the Lord Guilford should take effect, that yet there would be no room for any Relief; but that Case is not this neither; for here she married when there was a Possibility of marrying the Lord Guilford, and so hath destroy'd her Equity quite, by disabling her self; for once disabled, and ever so: So that if it should ever happen to be a Match between this Lady and the Lord Guilford, it could never secure the Estate to her: Infancy will not secure her; for where Infants take by Will, they are bound as strictly as other Persons.

It was also insisted upon, That the Lady was managed by her Trustees; and if the Trustees insisted upon Terms, it would be hard that she, that ought to be govern'd by her Trustees, should lose the Benefit of the Estate by their Means. But how can it be helped? The Trustees did it indeed out of Respect to the Lady, to get the best Terms they could. But they meddled in a Matter they had nothing to do with; they were Trustees of the Estate, but not of the Person, and had no Authority to obstruct the Marriage. Besides, Mr. Carie did not intend there should be any Settlement; he left her a fair Fortune, so as not to stand in need of any Jointure: And when he did not expect such a Provision should be made, how comes it to pass that the Trustees should interpose? It was unreasonable for the Trustees to meddle in it: For the Marriage was design'd during the Minority of the Lord Guilford; and the Trustees of that Lord were not oblig'd to charge their own Estate, and the Lord Guilford himself had no Power to make any Settlement during his Minority.

Then as to the Orders that were obtained heretofore in this Court, they were not at the Prosecution of the Lord Faulkland, who was a perfect Stranger to all these Proceedings, and therefore they can be no Injury to his Title; wherefore he concluded, that the Plaintiff's Bill ought to be dismissed.

And of such Opinion was the Lord Chief Justice Treby, who argued the Day before.

That it was plain upon the devising Words of the Will, that by the Intent of Mr. Carie, the Plaintiff's Lady was to take nothing, but upon a Condition Precedent: The Estate was limited to the Trustees for three Years, and the Profits were to be applied for several Purposes during that time: It was contingent who should take at the end of the three Years; if my Lady married the Lord Guilford, within the three Years, she was to take for Life, and after her Issue-Male by the Lord Guilford; but if she did not marry within three Years after the Devisor's Death, it was to rest in the Lord Faulkland.

Lord Chan-
cellor Somers.

It was said by the Defendant's Counsel, That the Words did not imply a Condition precedent: But if they were to advise how to make a Condition precedent, they could not frame one stronger than the Words set down.

To say, That if the Lady were lawfully married, is the same thing as if she were willing to be married, is a strange Construction, and a manifest Violence to the plainest Words.

It is not possible that any other part of the Will can make a different Construction from the devising Words.

Nothing can be inferred from her being Heir at Law; for the frame of the Will is such, as to exclude her from claiming as Heir at Law; for tho' she complied with the Terms of the Will, she was to have no more than an Estate for Life.

As to the Intention of Mr. Carie, in Expressions precedent, that can make nothing in the Case; for he might change his Mind as often as he pleased.

Some Letters of Mr. Carie to the Lady were objected, which, had they been read or prov'd, would have been of little use, because it is not pretended that he was at all alter surprized in the making or penning of the Will.

The precedent Intention was as fully proved in Fry and Porter's Case, as in this; and yet there it proved ineffectual.

It was said, That it was not the Testator's Design to exclude the young Lady, without her Default. It is most evident that it was his Intent to disinherit her; for he gave her only an Estate for Life, by Will, in case she did comply with the Terms of it; but nothing, if she did not.

Upon Consideration of the Words of the Will, he had as great a Consideration to the Lord Guilford as for this Lady; the Remainder was limited to the Issue of the Lady by the Lord Guilford.

Then whether it ought to make a Difference, that the Interest disposed of by Mr. Carie was not a legal Interest? Nothing is surely

B m

better

better settled in this Court. Then Rules of Property, if the same Words are used, cannot have different Significations in several Courts, altho' Courts of Equity may and do relieve against Points of Law, in case equitable Considerations do arise thereupon.

It was insisted, That altho' it were admitted that the Condition imposed was not literally performed, yet if it were comply'd with in Equity, it would suffice; and that it was so, they urged, That if the Lady did all in her part to be perform'd, she should not lose the Estate; that this was the favourable Case of Infancy, and the Case of Forfeiture; that the Lady made such Advancements as the Modesty of her Sex would admit of; that she sent Proposals, such as were condescending on her part, to consummate the Marriage, and stay'd till the Lord Guilford came to his Age of Consent before she married.

As to the latter part of the Case, he said, he did not doubt but that if the Defendant, the Lord Faulkland, who was to have the Advantage of her not marrying, had by any under-hand Arts of his put a Stop to the intended Marriage, there Equity would have interpos'd for the Benefit of the Lady: But whether any other Cause whatsoever, that did not arise from the Art of those that were to take Advantage by it, would be sufficient to excuse a Non-performance, would be hard to maintain. If the Lord Guilford had died within the Time, or refused to marry her, she had not been in a better Case: So if he had married her, and had after dissented at the Age of Consent, tho' in such Cases it would be hard, it was Mr. Carie's Disposition, and cannot be helped. This Court cannot make a new Will; but a Man that hath an Estate hath the full Power over it; and Mr. Carie might annex what Conditions he pleased to his own Estate.

Besides, the Lady and her Trustees are not wholly to be excused; for upon the 16th of December, 85, the Trustees of the Lord Guilford desir'd a present Marriage; to which she answer'd in writing: To her the Proposals were made, and the Answer, That she, when he attained the Age of Consent, would give her Answer, was a Refusal for that time.

Then further Steps were taken: The Lady sent her Proposals in to the Lord Guilford; to which his Guardians answered, That he was ready to consummate the Match, but could not enter into the Consideration of the Proposals made.

The next Step was made by the Guardians of the Lord Guilford, signifying, That he had arriv'd to the Age of Fourteen, and was ready to perform the Marriage: The Answer to which, in writing, was, That she would first expect her Proposals to be complied with.

The Father of the Lord Guilford died before Mr. Carie the Testator; so that Mr. Carie might have inform'd himself of the Lord Guilford's Estate, how it was left, and whether any Settlement might be conveniently made by him upon the Match: But the Testator did not impose any Terms, or require any thing to be done by that Lord, but that he should marry the young Lady. Mr. Carie knew the Age of both the Parties, and restrained the Marriage to the three Years after

after his Death; at which time no Settlement could be made, because of the Infancy of the Lord Guilford.

Infancy can be no Excuse for the Non-Performance of the Condition, because it is plain the Condition was to be performed when an Infant, or else it could never have been performed. In Fry and Porter's Case, the Lady was an Infant, and is a harder Case than this, because there was no notice of the Will at all: But where an Infant is bound to perform a Condition, he is bound to it as strictly as other Persons of full Age.

As to the Proposals, in behalf of the Lady, made,

They were to put the young Lord in a worse Case than was designed by the Will of Mr. Carie.

Besides that, the Lord Guilford was not to take any Estate himself by that Will, only the Issue-Male he should have by Mrs. Willoughby.

Then if the Lord Guilford might have gone further than he did, if he had pleased; yet that is not to be the Measure of Justice in case he went as far as he was obliged to do.

If the Proposals on the part of the young Lady were never so reasonable, and the Lord's Guardians were very unreasonable, that doth not relate to the the Person in Remainder, without any Default of the Lord Faulkland, the Trust is vested in him, and what Equity is there to take it from him, who is no Confederate nor Party to any Contrivance to defeat the Lady? There was no Suit at all against him; he was an Infant, and not privy to any ill Practice: The Condition was not performed, and thereupon his Interest commenced.

The Case of the Lord Salisbury and Bennet went upon different Grounds from this Case, because there was no Disposition of the Money over; and then the Rule admits it shall be only taken in Terrorem. The Sum of Money in the Case mentioned, was to be divided amongst the Daughters, if they married with Consent of their two Aunts, under their Hands and Seals: The one of the Aunts agreed to the Marriage of one of the Daughters, under Hand and Seal; the other Aunt was attended about it, but hesitated upon the Matter, and told the intended Husband, that she was going out of Town, and advised him to pursue the Design; by which she did not absolutely refuse him, but until she came to Town.

Where such things as are to be performed, may be valued, as conveying an Estate, or paying Money, there this Court doth give Relief; because it can make amends for want of Time and other Circumstances: So in case of Conditions subsequent, equitable Considerations may govern; but otherwise, in case of Conditions precedent, where nothing ever vested. If Conditions subsequent, annexed to Estates, become impossible by the Act of God, the Party shall have the Estate; but otherwise, in case of Conditions antecedent.

Whereas it was pretended, that the Marriage of the Lady to Mr. Bertie should be an Equivalent to her Marriage with the Lord Guilford; that cannot be warranted: For tho' both the Persons

were

were of equal Honour and Estate, yet the Intent of Mr. Carie is to be considered, who had an Eye to the Lord Guilford : And therefore this is not to be resembled to the Conveyance of an Estate, or Payment of Money, where such Equivalents may be allowed; and Mr. Bertie's Counsel were in this Bill at a loss what Conveyance of the Estate to ask.

Then the last thing to be considered in the Case, was, how far the Proceedings in Chancery might influence it. It was urged, that several Orders had been made in this Court in Opposition to the Proposals of the Guardians of the Lord Guilford by the Lord Chancellor Jefferies; That no Marriage should be had, unless a Compliance was first made to the Lady's Offers; that the Will directs the Account to be taken in Chancery; and that this Court hath the care and ordering of Infants. To which he answered, That true it was, that several things were trusted with this Court; It hath Jurisdiction of Infants, Idiots, and Charitable Uses. Several Statutes have altered matters in the Power of this Court, and so far they are alter'd, and no farther. The Courts of Wards and Libery, with respect to Infants and Idiots, were taken out of this Court, and transferr'd in some measure to that; but by the Dissolution of that Court, returns to this again: That Guardians are appointed by Writ for Infants, and one or more Guardians jointly: That the Law is favourable to Infants; no Decree of this Court shall be had against them, but what they may shew Cause against when they come of Age. This Court will make Strangers accountable to Infants, in case they take the Profits of their Estate; and tho' a Particular Person be appointed to take an Account, this Court can direct it shall be taken before the Court. This Court, upon Application made to it by Guardians, hath settled the Maintenance of Infants; but in case of Infants, this Court would never dispence with a Condition precedent, or take away the Right of one Infant (as the Lord Faulkland was) and give it to another, or can it ever bind those Persons that were never Parties to the Suit.

The Orders obtained of the Lord Chancellor Jefferies, were upon Misinformation, and false Suggestions: They told him, That good Terms might be had for the Lady, in case they were insisted upon: It was suggested, that she was ill provided for, and the End of the Petition did not agree with the Suggestions of it; That therefore the Lord Chancellor not being informed of the true Circumstances of the Fact, the Orders grounded upon such false Suggestions could not be at all binding.

Wherefore he decreed that the Plaintiff's Bill should stand dismissed

FINIS.



